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In The Supreme Court of the United States

CELSA HILAO, DANILO DE LA FUENTE, RENATO PINEDA, ADORA DEVERA, RODOLFO BENOSA, JOSE DURAN, JOSEFINA FORCADILLA, ARTURA REVILLA AND CHRISTOPHER SORIA,

Petitioners,

v.

REVELSTOKE INVESTMENT CORPORATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal law, not state law, determines when a federal judgment on a federal cause of action accrues so as to commence the running of a state law limitations period for enforcement where:

(a) the court of appeals' interpretation is directly contrary to this Court's opinion in *Borer v. Chapman,* 119 U.S. 587 (1887); and

(b) the court of appeals' interpretation directly conflicts with rulings of two other circuits?

2. Whether, since the question of the proper interpretation of the Hawai'i statute has now been certified to and accepted for decision by the Hawai'i Supreme Court (and briefing is almost complete), this Court should defer or hold consideration of this Petition until the Hawai'i Supreme Court issues its opinion on that critical question of law?

3. Whether this Court should vacate and remand this action to the court of appeals since that Court plainly erred in not finding that the Class's final judgment was not entered in the district court pursuant to FRCP 58 until December 6, 1995, less than ten years before the judgment was transferred to Texas?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 536 F.3d 980 (9th Cir. 2008). Pet.App.1a. The order of the United States District Court for the District of Hawai'i entered June 27, 2006 is unreported. Pet.App.22a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit reversing the district court's order was entered on July 31, 2008. Pet.App.1a. A timely petition for rehearing and rehearing *en banc* was denied on September 11, 2008. Pet.App.34a. This Court extended the time for filing this Petition to February 9, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Hawai'i Revised Statutes, § 657-5:

> Unless an extension is granted, every judgment and decree of any court of the State shall be presumed to be paid and discharged at the expiration of ten years after the judgment or decree was rendered. No action shall be commenced after the expiration of ten years from the date a judgment or decree was rendered or extended. No extension of a judgment or decree shall be granted unless

the extension is sought within ten years of the date the original judgment or decree was rendered. A court shall not extend any judgment or decree beyond twenty years from the date of the original judgment or decree. No extension shall be granted without notice and the filing of a non-hearing motion or a hearing motion to extend the life of the judgment or decree.

Federal Rule of Civil Procedure 58(b)(2):

Subject to Rule 54(b), the Court must promptly approve the form of judgment, which the clerk must promptly enter, when:

(A) the jury returns a special verdict or a general verdict with answers to specific questions; or

(B) the court grants other relief not described in this subdivision (b).

Federal Rule of Civil Procedure 69(a)(1):

A money judgment is enforced by a writ of execution unless the court directs otherwise. The procedure on execution – and in proceedings supplementary and in aid of judgment or execution – must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

INTRODUCTION

The court of appeals ruled that a $2 billion federal court judgment in favor of a Class of 9,539 human rights victims against the Estate of Ferdinand E. Marcos could not be extended to allow further collection efforts, basing its ruling entirely on a Hawai'i statute that had never before been interpreted and applied in the context of an appealed judgment. The court of appeals reached this ruling despite the fact that the appellate process was completed less than ten years before the judgment had been extended by the federal district court and despite the very active and continuing efforts of the Class of Human Rights Victims to collect the judgment, as exemplified by a case recently before this Honorable Court. *Republic of the Philippines v. Pimentel*, 128 S.Ct. 2180, 171 L.Ed.2d 131 (2008). Even though the Class's federal judgment was based on a federal cause of action, the court of appeals applied state law – not federal law – to determine when the judgment accrued for sunsetting purposes, *i.e.*, to commence the ten year state limitations period for enforcing the judgment. This conclusion of the court of appeals is directly contrary to this Court's decision in *Borer v. Chapman*, 119 U.S. 587, 602 (1887), which held that a state sunsetting statute does not begin to run on a federal judgment until all appeals are final. The court of appeals' decision is also in conflict with decisions in the Fifth Circuit, *Home Port Rentals, Inc. v. International Yachting Group, Inc.*, 252 F.3d 399 (5th Cir. 2001), and in the Sixth Circuit, *Jalapeno*

Property Management, LLC v. Dukas, 265 F.3d 506 (6th Cir. 2001), which applied a federal law accrual rule to state sunsetting statutes, and properly ruled that the limitations period does not begin until the appellate process is completed.

The court of appeals' interpretation and application of the Hawai'i statute, Section 657-5 of the Hawai'i Revised Statutes (H.R.S.), was based on its prediction of how the Supreme Court of Hawai'i might rule, not on any decision of that state court. The Class of Victims, in the motion for rehearing, asked the court of appeals to certify the question of the proper interpretation of the statute to the Hawai'i Supreme Court, but the court of appeals declined to do so. After the court of appeals' ruling, the Supreme Court of Hawai'i has agreed, in a case consolidated with the Class's case, to decide a certified question on when an appealed judgment accrues under the Hawai'i sunsetting law. Pet.App.31a. The briefing on this matter is almost complete, and because the Hawai'i Supreme Court may adopt a rule identical to the federal rule, this Court should defer decision on this Petition until the Hawai'i Supreme Court has ruled.

Certiorari is also appropriate in this case because the court of appeals failed to follow this Court's decision in *United States v. Indrelunas*, 411 U.S. 216 (1973). The court of appeals fundamentally erred in permitting Revelstoke's intervention in the Hawai'i proceeding based on its failure to consider that a Rule 58 judgment was not signed and entered by the clerk

of court in the consolidated cases until December 6, 1995 – less than ten years before the judgment was transferred to Hawai'i.

RELEVANT DATES

February 3, 1995	A judgment order is signed by district court judge in the Class case only
November 30, 1995	District court issues opinion, 910 F. Supp. 1460 (D. Haw. 1995)
December 6, 1995	Clerk of court signs and enters Rule 58 judgment for all cases in MDL 840
December 17, 1996	Court of appeals affirms Class's judgment, 103 F.3d 767 (9th Cir. 1996)
January 8, 1997	Mandate of court of appeals affirming Class judgment is entered in district court
April 4, 2005	The Class registers its judgment in Texas federal court
June 27, 2006	Hawai'i federal court extends Class judgment per H.R.S. § 657-5

STATEMENT OF THE CASE

This Petition is brought by the Class of Human Rights Victims who won a judgment against Ferdinand E. Marcos,[1] the former president of the Philippines, compensating them (and family members) for suffering resulting from torture, summary executions, and disappearances, based on rulings of a federal jury in Hawai'i which evaluated their claims in a trifurcated proceeding between 1992 and 1995. On February 3, 1995, the district judge signed an order titled "Final Judgment" for almost $2 billion in favor of this Class of 9,539 individual Filipinos who had been subjected to gross human rights abuses during the 1972-86 period of martial law in the Philippines. Pet.App.3a. The Class's judgment included a permanent decree enjoining the transfer or disposal of the Estate's assets. During the next ten months, judgments were entered by the district court in the other MDL No. 840 consolidated cases brought by individual plaintiffs. On November 30, 1995, the district court issued a written opinion addressing the legal issues raised during the litigation and directed the clerk to enter judgment. *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1469 (D. Haw. 1995), *aff'd*, 103 F.3d 767 (9th Cir. 1996).

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[1] After Marcos's death in 1989, his Estate was substituted as the defendant. The federal causes of action were based on the Alien Tort Statute and the Torture Victim Protection Act, 28 U.S.C. § 1350 and Note. *In re Ferdinand E. Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1462, 1469 (D. Haw. 1995).

Pursuant to Rule 58(b) of the Federal Rules of Civil Procedure, a final judgment in all the consolidated cases was signed and entered by the clerk of the district court on December 6, 1995 against the Marcos Estate. The Class's judgment was appealed to the court of appeals and affirmed on December 17, 1996. *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). The mandate was returned by the court of appeals to the district court on January 8, 1997.

Collection of the judgment proved exceedingly difficult. The Marcos heirs refused to pay the judgment or give depositions in aid of execution and continued "a pattern and practice to fraudulently secrete [the Estate's] assets and use off-shore corporations and cronies to hold title to property." Pet.App.24a. The Marcos heirs were held in civil contempt for transferring assets of the Estate in violation of the permanent injunction, *Hilao v. Estate of Marcos*, 103 F.3d 762, 767 (9th Cir. 1996), but refused to purge their contempt.

Based on newly discovered evidence regarding the Marcos assets, the Class transferred its Hawai'i judgment to the Northern District of Texas in April 2005 and initiated a diversity action against seven corporations, including Respondent Revelstoke Investment Corporation, Inc., for declaratory judgment and forfeiture.[2] The complaint explained that the real

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[2] *Del Prado v. BN Dev. Co.*, No. 05-234 (N.D. Tex.). On January 9, 2009 the Texas district court dismissed the complaint based on the Ninth Circuit ruling at issue here.

estate held by the seven corporations had been paid for and beneficially owned by Ferdinand Marcos (and now by the Marcos Estate) and sought foreclosure on those properties. Between 1979 and 1986, Jose Y. Campos,[3] a confidante of Ferdinand Marcos, purchased over 4,000 acres of real property in Texas for Marcos's using Marcos money[4] but titled the parcels of land in the names of seven Netherlands Antilles corporations which Campos controlled. This action followed a pattern Marcos employed to conceal his investments. Shortly after Marcos fled the Philippines in February 1986, Campos was sued by the Republic of the Philippines in Texas in a racketeering action to recover Marcos's properties which were under Campos's control.[5] That action was dismissed two months later – with no discovery taken – based on a settlement with the Republic in which Campos returned over 200 corporations and pieces of real estate beneficially owned by Marcos as well as $12 million. In return for a $10 million bribe paid to a high Philippine official,[6] Campos and his family

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[3] Jose Y. Campos was also instrumental in setting up Arelma Inc., a Panamanian corporation, which held $35 million of Marcos assets in a Merrill Lynch account for 28 years. *See Republic of the Philippines v. Pimentel,* 128 S.Ct. 2180, 171 L.Ed.2d 131 (2008).

[4] Declaration of Imelda Marcos dated January 21, 2005.

[5] *Republic of the Philippines v. Marcos*, No. 86-1184 (S.D. Tex.).

[6] Deposition testimony of Ferdinand R. Marcos, Jr. on June 20, 2007.

received immunity from prosecution in the Philippines and were permitted to retain a dozen Netherlands Antilles corporations, including Revelstoke, which Campos then claimed as his own. Campos subsequently formed seven United States corporations that became the successors to the Netherlands Antilles corporations, and which currently hold title to the real estate at issue. The seven corporations are, in turn, owned by Panamanian corporations that are owned by Hong Kong Trusts. The Class values the real estate at more than $100 million.

In the action brought by the Class in Texas, the seven corporations, including Revelstoke, contended that the Class's Hawai'i judgment was unenforceable under Hawai'i law at the time it was transferred to Texas in April 2005 because more than ten years had passed since a judgment order in favor of the Class was signed by the district judge on February 3, 1995. After the Class filed a motion in the Hawai'i federal court to extend its judgment, Revelstoke's attempt to intervene in the Hawai'i action was denied, Pet.App.25a-27a, and the district court entered an order on June 27, 2006 extending the Class's judgment for ten years. Pet.App.22a. In this ruling, the district court explained that the extension was governed by federal law because it was based on a federal cause of action and because "Congress created a statutory regime for entry of and transfer of federal court judgments which would be impeded by" strict adherence to the state statute. Pet.App.23a. The court also stated that good cause existed for the

extension because of the efforts by the Marcoses to hide assets and their failure to comply with court orders, as well as because of the "due diligence and exceptional efforts" of the Class to collect its judgment. Pet.App.24a.

The district court also ruled, in the alternative, that if the Hawai'i sunsetting statute applied, the extension was still proper because the ten-year period under H.R.S. § 657-5 did not begin "until issuance of the mandate of the Ninth Circuit was spread on the record of this Court on January 8, 1997." Pet.App.23a. Neither the Marcos Estate nor Revelstoke contested the existence of good cause to extend the judgment.

Revelstoke appealed to the court of appeals which reversed and held the Hawai'i judgment was unenforceable in Hawai'i. Pet.App.20a. It held that a federal judgment on a federal cause of action is subject to state sunsetting laws and that a judgment is "rendered" under H.R.S. § 657-5 when a final judgment is entered in the trial court even though the judgment is appealed. Pet.App.18a-19a.

The Class moved for rehearing raising several issues, including that the final judgment for the Class was not entered pursuant to Rule 58 of the Federal Rules of Civil Procedure until December 6, 1995 and requested the court of appeals to certify to the Hawai'i Supreme Court the question of when an appealed judgment is "rendered" under H.R.S. § 657-5 since no Hawai'i decision had ever interpreted that

term in connection with an appealed judgment. The court of appeals denied rehearing without comment. Pet.App.34a. On January 9, 2009, the Texas district court dismissed the Texas action based on the decision of the Ninth Circuit.

REASONS FOR GRANTING THE PETITION

I. Federal Law, Not State Law, Determines When a Federal Judgment Accrues for Sunsetting Purposes.

Federal statutory or common law determines the finality of judgments for all purposes, including when a federal judgment on a federal cause of action accrues for enforcement and sunsetting purposes. Federal law has always controlled when a federal judgment is deemed "final" for purposes of appeal, *see Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 203 (1999), and this Court has long rejected the assertion that state law determines when a federal judgment is final. *Amis v. Smith*, 41 U.S. 303, 313-14 (1842). As regards *res judicata*, this Court has held that "[t]he preclusive effect of a federal-court judgment is determined by federal common law." *Taylor v. Sturgell*, 128 S.Ct. 2161, 2171, 171 L.Ed.2d 155 (2008). Federal courts have always applied federal common law to determine when a cause of action on a federal statute accrues even while borrowing state limitations periods. *See, e.g., Wallace v. Kato*, 549 U.S. 384, 388 (2007); *Romero v. Allstate Corp.*, 404 F.3d 212, 221 (3d Cir. 2005); *Tolle v. Carroll Touch,*

Inc., 977 F.2d 1129, 1138 (7th Cir. 1992); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE § 4519 (2d ed. 1996). In *Borer v. Chapman*, 119 U.S. 587, 602 (1887), this Court ruled that the state time period to enforce a federal judgment did not begin to run until all appeals were completed.

This Honorable Court addressed the same issue presented in this case more than a century ago in *Borer v. Chapman*, 119 U.S. 587, 602 (1887), and this Court reached a conclusion opposite to the conclusion of the court of appeals, holding that the state time period to enforce a federal judgment did not begin to run until all appeals were completed. "It cannot be that the statute of limitations [state sunsetting law] will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced." *Id.* at 602. This Court explained that until final judgment was "actually entered" after appeal, "the right of the complainant . . . to enforce that [federal] judgment" "was in abeyance" because "the litigation had, until then ended, been continuously in progress." *Id.* This Court has endorsed the principle set forth in the *Borer* decision in other cases. For example, in *United States v. Wurts*, 303 U.S. 414, 418 n.10 (1938), this Court cited *Borer* for the proposition that a statute of limitations does not begin to run until a judgment is in a position to be enforced. The district court followed this Court's precedent when it ruled that the Class's federal judgment did not accrue for sunsetting purposes "until issuance of the mandate

of the Ninth Circuit was spread on the record of this Court on January 8, 1997." Pet.App.23a.

The court of appeals' conclusion that the time period for the running of a sunsetting statute begins with the district court's entry of final judgment is inconsistent not only with this Court's holding in *Borer* but also with the holdings of the only two other circuits that have considered this question. The court of appeals applied the Hawai'i statutory accrual date to the Class's federal judgment, not the federal accrual date. Pet.App.18a. In direct contrast, the Fifth Circuit has ruled, relying on 28 U.S.C. § 1963, that the accrual date for federal judgments is after all appeals are completed or the time for appeal has expired, characterizing any contrary view "clearly specious." *Home Portal*, 252 F.3d at 406, 409 n.29. The Fifth Circuit specifically quoted and applied § 1963's language, "when the judgment has become final by appeal or expiration of the time for appeal," in ruling that the federal judgment had not lapsed under the state sunsetting law.

The Sixth Circuit, applying federal common law, has also ruled that time limits for the sunsetting of federal judgments do not begin until after the mandate issues following an appeal. *Jalapeno Prop. Mgmt., LLC v. Dukas*, 265 F.3d 506 (6th Cir. 2001). The facts in *Jalapeno* are very similar to those in the present action. There, the district court denied a motion to extend enforcement of a federal judgment, ruling that the motion was made more than ten years after the entry of judgment in the district court.

Relying on federal common law, the Sixth Circuit reversed stating that the "district court improperly calculated the running" of the state sunsetting statute because the ten-year period did not begin until the date of the appellate court's issuance of its mandate affirming the federal judgment. *Id.* at 514.

These Fifth and Sixth Circuit cases thus make it clear that although state sunsetting laws have been applied to the enforcement of federal judgments pursuant to Federal Rule of Civil Procedure 69(a), *Custer v. McCutcheon*, 283 U.S. 514, 519 (1931),[7] federal common law determines the accrual date for when a federal judgment on a federal cause of action is ripe for enforcement and sunsetting purposes. Congress has never placed limits on how long a federal judgment on a federal cause of action may be enforced, but it did set the federal standard for finality of a judgment for enforcement purposes in the comparable situation governing registration of judgments in sister districts in 28 U.S.C. § 1963 and made it clear in that context that finality for registration was when "the judgment has become final by appeal or expiration of the time for appeal." By implication, this same moment – when the appellate process has been completed – must be the accrual standard

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[7] This Court has never held directly that federal judgments on federal causes of action are subject to state sunsetting laws. In *Custer*, this Court stated that state time periods for enforcement of judgments are not statutes of limitation. 283 U.S. at 519.

applicable via federal common law to the sunsetting of federal judgments on federal causes of action. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (the federal law accrual date may be derived "by implication from the structure and text of the statute").

Until a judgment is final after appeal, anything a judgment creditor collects is in jeopardy, and enforcement may be prohibited or stayed. *See, e.g., Caldwell v. Puget Sound Elec. Apprenticeship and Training Trust*, 824 F.2d 765 (9th Cir. 1987) (ordering the return of money collected on judgment reversed on appeal); RESTATEMENT (FIRST) OF RESTITUTION § 74 (1937). So that all federal judgments on federal causes of action will have a period of enforcement equal to the enforcement period prescribed by state sunsetting laws, federal common law must provide a uniform accrual date. *See Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (applying federal common law because application of state law creates "exceptional uncertainty" and "would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states," and therefore "[t]he desirability of a uniform rule is plain"). Applying § 1963's standard as the federal law accrual date for sunsetting purposes continues the borrowing of state law time periods for enforcement but sets a uniform standard for calculating the periods. This Court reached this conclusion long ago in *Borer*, and the Fifth and Sixth Circuits have followed that approach. Consequently, the decision of the court of appeals in the present case

must be reversed because, as a matter of federal common law, a federal judgment on a federal cause of action does not accrue for sunsetting purposes until all appeals are complete or the time for appeal has expired.

Determining when a federal judgment on a federal cause of action is "final" and "rendered" for enforcement purposes is quintessentially a matter of federal law, not state law. The United States has a "vital" interest in the enforcement of its judgments. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992); *see also Riggs v. Johnson County*, 73 U.S. 166, 187 (1867) (execution on a judgment is "essential" to the judicial power of the federal courts). That interest is no more evident than in the enforcement of the judgment in the instant case for massive human rights violations. The United States has committed itself to providing a remedy for victims of human rights abuses. *See* U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, Dec. 10, 1884, 1465 U.N.T.S. 85. The remedies under the Alien Tort Statute and the Torture Victims Protection Act, *supra*, rely on private enforcement. Application of state law to prevent enforcement of a federal judgment for human rights violations would eviscerate the private enforcement of compensation for human rights violations.

The doctrine of finality of judgments is well understood under federal law. Finality requires that all appeals be completed or the time for appeal has

run.[8] Litigants and practitioners understand this. It would be illogical and unfair to litigants to have "the clock start running" on federal judgments at one time for enforcement purposes under § 1963 and at another time for sunsetting. The federal interest in having federal judgments construed uniformly is paramount. In *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69 (1948), this Court stated:

> The considerations that determine finality are not abstractions but have reference to very real interests – not merely those of the immediate parties but, more particularly, those that pertain to the smooth functioning of our judicial system.

Congruency and consistency require a uniform start date for when a federal judgment is final for sunsetting purposes. The federal interest outweighs any interest individual states may have. Consistency would also promote fairness and remove a minefield for the unwary. Appeals to successive courts can take years before there is finality. The recent appeal involving the Class's judgment on a collection matter took more than four years. *Republic of the Philippines v. Pimentel,* 128 S.Ct. 2180 (2008). Other appeals of

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[8] In the criminal context, the federal circuits uniformly hold that an appealed conviction is final upon issuance of the appellate court mandate. *See, e.g., Romero v. United States*, 28 F.3d 267, 268 (2d Cir. 1994) (construing Fed. R. Crim. P. 33); *United States v. Kingston*, 875 F.2d 1091, 1109 (5th Cir. 1989) (Speedy Trial Act).

federal judgments have taken longer and can even exceed the enforcement time period in some states. It would be a cruel irony if an unappealed federal judgment would have a longer enforcement period than one contested on appeal for years.

Rule 69(a) of the Federal Rules of Civil Procedure is not inconsistent with application of a uniform federal accrual rule. Rule 69(a) looks to state procedural law but does not require application of state procedural law when "a federal statute governs." The uniform accrual date identified in 28 U.S.C. § 1963 (the end of the appellate process) or the application of this same uniform accrual date via federal common law governs the accrual date for federal judgments. *Cf. Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 706 (2006) (stating that federal common law is equivalent to a federal statute). This approach is consistent with this Court's ruling in *Byrd v. Blue-Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537 (1958) that, even in diversity cases, federal courts must identify "affirmative countervailing" federal interests raised by claims in federal courts and balance them against state procedural rules because "[t]he federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction."

The proper accrual date in the present case was thus when the appellate process was completed and the mandate of the court of appeals was returned to the district court – on January 8, 1997 – and therefore the extension of the Class's judgment on June 27,

2006 was well within the ten year period of H.R.S. § 657-5. Accordingly, because the decision of the court of appeals conflicts with this Court's decision in *Borer* and with other decisions in the Fifth and Sixth Circuits, this Court should grant certiorari to review the issue.

II. This Court Should Defer or Hold Decision on this Petition Until the Supreme Court of Hawai'i Answers the Question of State Law Certified to It.

In a case consolidated at trial with the present action, the Hawai'i Supreme Court has agreed to decide when an appealed judgment is "rendered" for purposes of Hawai'i's sunsetting statute, H.R.S. § 657-5. Pet.App.31a-32a. On September 12, 2008, a motion to extend the judgment under H.R.S. § 657-5 was heard by the Hawai'i district court in a case consolidated with the Class case in MDL 840. In that case, three human rights victims with separate judgments against the Marcos Estate sought to extend their judgment under H.R.S. § 657-5. By order dated September 26, 2008, the Hawai'i district court certified the following question to the Hawai'i Supreme Court:

> With regard to the time period for executing a judgment in H.R.S. § 657-5, does the time period begin after the appellate process is completed (because the appeal may provide relief in the form of damages not provided for in the original judgment and because the

> completion of the appellate process allows the judgment creditor to proceed without limitation to collect the judgment), or, in the alternative, given that an amended judgment establishes the relationship between judgment creditor and debtor, does an amendment or modification of the original judgment (including an amended judgment providing for additional relief) start the time period anew?

Pet.App.28a-29a. The certified question would have been fully briefed by February 2, 2009 but for a 30-day extension of the briefing schedule obtained by the Marcos Estate. Both the Class and Respondent Revelstoke have filed *amicus* briefs in that proceeding.

This Court has commented favorably on the advantage of obtaining an answer to a certified question about the interpretation of a state statute from the Supreme Court of Hawai'i. *See Burdick v. Takushi*, 504 U.S. 428, 431-32 (1992). This Court has adopted the approach that:

> Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court.

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 510 (1985) (O'Connor, J., concurring) (quoted in *Arizonians for Official English v. Arizona*, 520 U.S. 43, 77

(1997)). "Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'" *Arizonians for Official English v. Arizona*, *id.* (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). In *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978), this Court stated that "[i]n a federal system, it is obviously desirable that questions of law which, like domicile, are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts." "[W]here as here there is an efficient method for obtaining a ruling from the highest court of a State we do not hesitate to avail ourselves of it." *Id.* This Court has not infrequently certified questions to state courts on its own. *See, e.g., Stewart v. Smith*, 534 U.S. 157 (2001). In this case, the "efficient method" is to defer decision on the instant Petition to allow the Hawai'i Supreme Court to answer the certified question of unsettled state law in MDL 840.

The court of appeals' prediction of Hawai'i law on what it described as a "novel" issue, Pet.App.2a, was a critical underpinning to its ruling now under review by this Court. The decision of the Supreme Court of Hawai'i relied upon by the court of appeals[9] did not

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[9] *International Savings & Loan Ass'n v. Wiig*, 921 P.2d 117 (Haw. 1996), relied upon by the Ninth Circuit (Pet.App.14a), is inapposite to the issue of when an appealed judgment is "rendered"

(Continued on following page)

involve an appealed judgment. Clearly, the Supreme Court of Hawai'i would not have agreed to decide the issue if earlier decisions of that Court had addressed it or if that Court thought there was no merit to the issue. If the Supreme Court of Hawai'i concludes that the prediction of Hawai'i law made by the court of appeals was incorrect, and thus that the Hawai'i statute should be interpreted in the same way that comparable federal and state statutes have been interpreted (to commence the sunsetting period when the appellate process is completed), then the registration of the judgment in Texas and its extension by the Hawai'i federal court would have been timely and proper.

Deferral of action on this Petition until the Supreme Court of Hawai'i rules could avoid a grave injustice to the Class of human rights victims. A positive ruling from the Supreme Court of Hawai'i after a denial of certiorari would leave the Class remediless. This Court regularly defers or holds decision on certiorari petitions while awaiting the position of a state's highest court on specific issues. *See, e.g., Lynum v. Illinois*, 368 U.S. 908 (1961); *Herb v. Pitcairn*, 324 U.S. 117 (1945). In the past, this

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under H.R.S. § 657-5 because it did not involve an appealed judgment. A recent decision of the Hawai'i intermediate appeals court in *Beecher Ltd. v. Alvarez & Marsal N.A., LLC*, 187 P.3d 593 (Haw. App. 2008), Table, Text in 2008 WL 616289 at *4, suggests that the an appealed judgment is "rendered" under H.R.S. § 657-5 after all appeals are final.

Court has found "puzzling" the Ninth Circuit's tendency not to utilize the certified question method to obtain an authoritative answer to an unsettled question of state law. *Arizonans for Official English*, 520 U.S. at 77.

Since a decision by the Hawai'i Supreme Court on this "novel" issue of state law is expected shortly, this Court should defer or hold decision on the Petition until the Hawai'i Supreme Court answers the certified question.

III. By Ignoring Rule 58(b), the Court of Appeals Committed a Fundamental Error of law in Assuming the District Court's February 3, 1995 Order was the Final Judgment for the Class and Premising Intervention on that Error.

The court of appeals erred in assuming the February 3, 1995 Order was a final judgment (Pet.App.14a), even though it is apparent from the district court docket that a Rule 58(b) final judgment was not entered by the clerk of the court until December 6, 1995. This error is significant because the Class registered its judgment in the federal court for the Northern District of Texas in April 2005, well within ten years after the December 6, 1995 docket entry. The registration in Texas was thus valid under any possible interpretation of state and federal law, and Revelstoke's intervention in the Hawai'i federal court was improper because it had no cognizable interest that was impaired by that court's extension

of the Class's judgment. The Class's motion to extend its judgment in Hawai'i would not affect the status of the Class's judgment registered in Texas because, once properly registered in Texas, that judgment stood on its own under 28 U.S.C. § 1963. As the court of appeals below readily acknowledged, the judgment registered in Texas "is the functional equivalent of obtaining a new judgment in the registration court." Pet.App.17a. Therefore, the critical issue under Texas law was whether the Class's judgment in Texas was registered in Texas within ten years of the Hawai'i district court's Rule 58(b) final judgment. *See* Tex. Civ. Prac. & Rem. Code § 16.066(a) (foreign judgment must be registered within 10 years). If registration occurred within ten years, then intervention under Rule 24 was improper and the entire decision of the court of appeals must be vacated.

The Hawai'i Supreme Court case relied upon in the court of appeals's opinion, *International Savings & Loan Ass'n v. Wiig*, 921 P.2d 117 (Haw. 1996), utilized the date final judgment was entered in the Hawai'i trial court as the "rendered" or accrual date for H.R.S. § 657-5, because no appeal was taken in that case. Assuming the applicability of H.R.S. § 657-5 to the Class's federal judgment (and assuming that the time does not begin to run after exhaustion of appeals), the applicable accrual date would be the entry of a final judgment pursuant to Rule 58(b). The court of appeals gave no consideration to whether the February 3, 1995 order was a "final judgment" pursuant to the requirements of Rule 58. In fact, no final

judgment was entered for the Class until December 6, 1995 when the clerk of the Hawai'i district court signed and entered judgment in the consolidated case.[10] Moreover, the district court has ruled that final judgment in MDL 840 was not entered until December 6, 1995, and that ruling is the law of the case. The district court stated "[a] final judgment as to all consolidated actions in MDL 840 pursuant to FRCP 58 was entered by the Clerk of the Court on December 6, 1995." Pet.App.29a.

There could be no Rule 58(b) final judgment for the Class until judgments were also entered in the other cases consolidated for trial with the Class case. That occurred after other orders, also denominated "Final Judgments," were entered in the consolidated cases and after the district court stated formally that "judgment shall be entered for plaintiffs." *In re Ferdinand E. Marcos Human Rights Litig.*, 910 F. Supp. at 1469. The pertinent docket entries are conclusive on this issue:

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[10] The Judicial Panel on Multidistrict Litigation consolidated five cases (both class and individual) against the Marcos Estate by Order dated June 5, 1990 in MDL 840. The cases were consolidated for trial by the trial judge, and the verdict for punitive damages was common to all the cases. *See In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 25 F.3d 1467, 1469 (9th Cir. 1994); Ralph Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 Yale J. Int'l L. 65, 92 (Winter 1995) (detailing the consolidated cases).

1995	Entry	Signatory
Jan. 18	"Verdict – Class Action – Cv. Nos. 86-0390-R & 86-033-R . . . "	
Jan. 20	"Special Verdict – Cv. Nos. 90-670-R, 90-671-R, 87-138-R, 86-225-R . . . "	
Feb. 3	"Final Judgment – on behalf of Plaintiffs" [for the Class]	Real
Mar. 14	"Final Judgment – Final Judgment is entered in favor of 21 direct action pltfs . . . "	Real
Aug. 11	"Final Judgment – Nos. Cv. 86-0225 and Cv. 87-0138 – Final Judgment entered pursuant to FRCP 58 in favor of plaintiffs Jaime Piopongco and Estate of Francisco Sison . . . "	Real
Nov. 30	"Opinion [Relates to All Actions] . . . Judgment should be entered for Plaintiffs . . . "	Real
Dec. 6	"Judgment – entered pursuant to the "Opinion and Order," filed on November 30, 1995 (cc: all parties) [Relates to All Actions]"	Chinn/ Nakamura[11]

[11] Mr. Chinn was the Clerk of the United States District Court for the District of Hawai'i, and Mr. Nakamura was the chief docketing clerk in the Clerk's office.

Dec. 13	Order – severing claims of Buncio, Socco and Fabic	Real
Dec. 13	Final Judgment – [Re: Cv. 90-670-R and Cv. 90-671-R] in favor of Buncio, Socco and Fabic[12]	Real
1996		
Jan. 8	"Final Judgment – in favor of these 16 action plaintiffs . . . "	Real

The ruling of the court of appeals is directly contrary to this Court's decision in *United States v. Indrelunas*, 411 U.S. 216 (1973). There, this Court held that Rule 58 means what it says: "every judgment shall be set forth on a separate document" signed and entered by the clerk. *Id.* at 222. The purpose of Rule 58 was to make the date of entry of judgment mechanical to avoid "uncertainties" and "spawn[ ] protracted litigation." *Id.* Furthermore, Rule 58 explicitly conditions entry of final judgment on compliance with Rule 54(b) which provides in pertinent part:

> . . . any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties *does not end the action as to any of the claims or parties* and may be revised at any time before the entry

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[12] Although titled "Final Judgment," the orders of Dec. 13 and Jan. 8 are amended judgments since the March 14 order for 21 plaintiffs included Buncio, Socco, Fabic and the "16 action plaintiffs."

> of a judgment adjudicating all the claims and all the parties rights and liabilities.

Fed. R. Civ. P. 54(b) (emphasis added). Rule 54(b) further provides that:

> . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties *only if the court expressly determines that there is no just reason for delay.*

Id. (emphasis added). In the Hawai'i MDL litigation there was no motion for a Rule 54(b) determination and no such express determination by the court. In the Ninth Circuit, compliance with Rule 54(b) is a *sine qua non* for entry of final judgment under Rule 58. *Huene v. United States*, 743 F.2d 703, 705 (9th Cir. 1984) ("where an order disposes of only one of two or more cases consolidated at the district court level, the order is not appealable under 28 U.S.C. § 1291 absent a Rule 54(b) certification"). The Supreme Court of Hawai'i specifically adopted the rule in *Huene*. *See Leslie v. Estate of Tavares*, 122 P.3d 803, 808 (Haw. 2005). In *Reiter v. Cooper*, 507 U.S. 258, 270 (1993), this Court vacated a judgment because the lower court failed to make the "express determination" required by Rule 54(b) for entry of judgment.

Therefore, consistent with Rules 54(b) and 58(b), the separate document titled "Judgment" signed, filed and entered by the Clerk on December 6, 1995 is the operative document finalizing the jury verdict in favor of the Class as well as finalizing the jury verdicts as to all other parties and claims. *See also*

Jalapeno Prop. Mgmt., LLC v. Dukas, *supra*. (compliance with Rule 54(b) is a prerequisite to the running of a state sunsetting period). To put it in the language of this Court's *Borer* decision, the judgment was not in a form to be enforced until December 6, 1995.

The Class registered its judgment in the Northern District of Texas on April 4, 2005 pursuant to 28 U.S.C. § 1963, well within ten years of the December 6, 1995 "Judgment" signed and entered by the Clerk of Court in Hawai'i in MDL 840. Registration immediately rendered it a judgment of the Texas district court. *Home Portal Rentals, Inc.*, 252 F.3d at 405. Therefore, Revelstoke lacked "a significant protectable property interest" in the Hawai'i judgment within the meaning of Rule 24 because its property rights were solely impacted by the Texas judgment, not the Hawai'i judgment. Because the court of appeals' error is apparent on the record, this Court should simply vacate that court's opinion and remand the case with instructions to affirm the decision of the district court in lieu of granting certiorari.

CONCLUSION

For all the foregoing reasons Petitioners respectfully urge this Court (1) to defer consideration of this Petition until the Hawai'i Supreme Court has ruled on the certified question of state law central to this appeal, and (2) then grant certiorari to review the

issues presented. In the alternative, this Court should vacate the court of appeals opinion and remand the case with instructions to affirm the decision of the district court.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: ESTATE OF FERDINAND E. MARCOS HUMAN RIGHTS LITIGATION,	
CELSA HILAO, *Plaintiff-Appellee*, v. ESTATE OF FERDINAND MARCOS, *Defendant-Appellee*, REVELSTOKE INVESTMENT CORPORATION, INC. *Applicant for Intervention and Appellant.*	No. 06-16301 D.C. No. MDL-00840-MLR OPINION

Appeal from the United States District Court
for the District of Hawaii
Manuel L. Real, District Judge, Presiding

Argued and Submitted
June 17, 2008 – Honolulu, Hawaii

Filed July 31, 2008

Before: Alfred T. Goodwin, Pamela Ann Rymer, and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Rymer

COUNSEL

Eugene D. Gulland (argued) and Richard A. Jones, Covington & Burling LLP, Washington, D.C., for the proposed-intervenors-appellants.

Jon Van Dyke, Honolulu, Hawaii, (argued); Robert A. Swift, Kohn, Swift & Graf, P.C., Philadelphia, Pennsylvania, for the appellee.

OPINION

RYMER, Circuit Judge:

This appeal requires us to consider a novel situation involving the registration of a federal judgment. In short, the judgment was rendered in the United States District Court for the District of Hawaii and registered in the United States District Court for the Northern District of Texas, where the prevailing plaintiff sought to enforce it against a non-party, Texas defendant. The defendant in the Texas enforcement action moved to dismiss on the ground that the judgment was not timely registered because, under Texas's borrowing statute, the Hawai'i "statute of limitations" for enforcing judgments applies and under it, the judgment had expired. This prompted the plaintiff to ask the rendering court to declare that the judgment was live and, in any event, to extend it, which the district court did. Meanwhile, the collection defendant moved to intervene in the extension proceeding, which the district court did not allow, and

then to appeal the extension, which the court also did not allow. We conclude that the party against whom enforcement was sought had a significant protectable interest at stake that gave it the right to be heard in the extension proceeding, and to appeal. Having considered the intervenor's arguments on the merits, we also conclude that the district court erred in purporting to extend the judgment. Accordingly, we reverse the orders denying intervention, and vacate the order granting extension.

I

In March, 1986, a class of human rights victims whose lead plaintiff was Celsa Hilao brought suit in the District of Hawaii against Ferdinand E. Marcos and his estate. This action became part of a multidistrict proceeding, *Estate of Ferdinand E. Marcos Human Rights Litigation,* MDL 840, over which the transferee judge, Honorable Manuel L. Real, presided. A judgment was entered in Hilao's favor on February 3, 1995 (the MDL 840 Judgment). In it, the court retained jurisdiction. The MDL 840 Judgment was appealed and affirmed, *Hilao v. Estate of Marcos,* 103 F.3d 767 (9th Cir. 1996); our mandate issued January 8, 1997. Before commencing the proceedings at issue here, Hilao registered the MDL 840 Judgment in the Northern District of Illinois in January 1997, the Republic of the Philippines in May 1997, and Singapore in February 2005. Hilao

then registered the MDL 840 Judgment in the Northern District of Texas pursuant to 28 U.S.C. § 1963,[1] and filed a class action complaint April 8, 2005 against Revelstoke Investment Corporation, Inc., and six other corporations (collectively, "Revelstoke"), alleging that real properties to which Revelstoke holds title in Texas are beneficially owned by the Marcos Estate, and seeking to execute and foreclose on those properties in partial satisfaction of the MDL 840 Judgment.

On May 9, 2006, Revelstoke notified Hilao of its belief that the MDL 840 Judgment had expired pursuant to Hawai'i Revised Statute § 657-5[2] as

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[1] Section 1963 provides in pertinent part:

A judgment in an action for the recovery of money or property entered in any . . . district court . . . may be registered by filing a certified copy of the judgment in any other district . . . when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown. . . . A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

[2] HRS § 657-5 provides:

Unless an extension is granted, every judgment and decree of any court of the State shall be presumed to be paid and discharged at the expiration of ten years after the judgment or decree was rendered. No action shall be commenced after the expiration of ten years from the date a judgment or decree was rendered or extended. No extension of a judgment or decree shall be granted unless the extension is sought within ten

(Continued on following page)

applied through the Texas statute of limitations, Texas Civil Practice & Remedies Code § 16.066(a), which is a borrowing statute.[3] HRS § 657-5 provides that a judgment is presumed paid and discharged ten years after it is rendered, unless the judgment is extended within that ten-year period.

On June 5, Hilao filed a motion pursuant to Federal Rules of Civil Procedure 69 in the MDL 840 action for a ten-year extension of the judgment. Hilao's memorandum in support explains that the issue had been raised in the Texas collection litigation and that, while Hilao believed HRS § 657-5 was not applicable to her federal judgment, she sought an extension out of an abundance of caution.

Revelstoke filed a motion for judgment on the pleadings in the Texas litigation on June 15, contending that the enforcement action was barred by the Hawai'i ten-year statute of limitations borrowed in the forum state by Tex. Civ. Prac. & Rem. Code § 16.066(a). On June 19, Hilao asked the Northern District of Texas to stay proceedings on Revelstoke's

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years of the date the original judgment or decree was rendered. A court shall not extend any judgment or decree beyond twenty years from the date of the original judgment or decree. No extension shall be granted without notice and the filing of a non-hearing motion or a hearing motion to extend the life of the judgment or decree.

[3] Tex. Civ. Prac. & Rem. Code § 16.066(a) provides: "[a]n action on a foreign judgment is barred in this state if the action is barred under the laws of the jurisdiction where rendered."

motion until after the District of Hawaii ruled on Hilao's request to extend the judgment. A stay was subsequently entered.

On June 22, Revelstoke moved to intervene in MDL 840 for the limited purpose of contesting Hilao's motion to extend. Hilao did not oppose intervention.

At a hearing held on June 26, Judge Real first granted Hilao's motion to extend the judgment. After ruling on that motion, the court considered, and denied, Revelstoke's request to intervene for the purpose of opposing the motion. Its reasons, stated from the bench, were that the court had no jurisdiction over the matters in Texas; that the Texas litigation had not been sent to the District of Hawaii under the multidistrict case; and that nothing that happens in the District of Hawaii can affect the judgment in Texas.

The same day the court signed a written order, in the form proposed by Hilao, granting the extension. The order was entered June 27, and finds that the MDL 840 Judgment was not final until issuance of the Ninth Circuit mandate on January 8, 1997; HRS § 657-5 only applies to "domestic" judgments and federal court judgments have no expiration date; application of HRS § 657-5 to federal court judgments on federal causes of action would be barred by the Supremacy Clause; and alternatively, even if HRS § 657-5 were applicable, good cause exists to grant an extension to January 8, 2007 given Marcos's pattern and practice of secreting assets.

Revelstoke then moved to intervene for the limited purpose of appealing the district court's extension order. The court denied this motion in a written order that states: "This matter rests in the jurisdiction of the Texas litigation."

Revelstoke filed a timely notice of appeal from the district court's orders denying intervention and granting the extension.

II

Intervention is governed by Fed. R. Civ. Proc. 24(a) and (b). To intervene as of right pursuant to Rule 24(a), an applicant must show that "(1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest." *S. Cal. Edison Co. v. Lynch,* 307 F.3d 794, 802 (9th Cir. 2002) (quoting *United States v. City of Los Angeles,* 288 F.3d 391, 397 (9th Cir. 2002) (quoting *Donnelly v. Glickman,* 159 F.3d 405, 409 (9th Cir. 1998) (internal quotation marks omitted))).

Only the first requirement is seriously disputed. For this requirement, we set out an "analytical framework" in *City of Los Angeles,* 288 F.3d at 398. As summarized in *Southern California Edison*:

> An applicant has a "significant protectable interest" in an action if (1) it asserts an interest that is protected under some law, and (2) there is a "relationship" between its legally protected interest and the plaintiff's claims. The relationship requirement is met if the resolution of the plaintiff's claims actually will affect the applicant. The "interest" test is not a clear-cut or bright-line rule, because no specific legal or equitable interest need be established. Instead, the "interest" test directs courts to make a practical, threshold inquiry, and is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.

307 F.3d at 803 (internal quotation marks and citations omitted.)

Revelstoke argues that it has an interest – avoiding the loss of its real property in the Texas action – that is protected under HRS § 657-5, which shields persons such as Revelstoke from efforts to enforce judgments that have expired. Further, in Revelstoke's view, the relational element is met because its motion in the Northern District of Texas seeks to vindicate this interest, while Hilao's motion for an extension in the District of Hawaii seeks to thwart it. Hilao counters that Revelstoke's interest is solely concerned with property in Texas that is the subject of a separate lawsuit unrelated to the subject matter of MDL 840 – the torture, summary execution and disappearance of

thousands of Filipinos at the hands of Ferdinand Marcos.

We review *de novo* the district court's denial of intervention as of right, *Southern California Edison,* 307 F.3d at 802, and are guided by the maxim that the requirements for intervention are broadly interpreted in favor of intervention. *See, e.g., City of Los Angeles,* 288 F.3d at 397.

We conclude that Revelstoke had the right to intervene on the record adduced. Hilao interposed no objection to intervention, which implicitly conceded the significance of a protectable interest related to her motion to extend.[4] The district court ruled without reference to Rule 24(a) or the factors that frame the "significant interest" analysis. Of the reasons given – no jurisdiction over the matters in Texas, the Texas litigation had not been sent to the District of Hawaii, and nothing that happens in the District of

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[4] So, too, does her request for a stay in the collection action. Hilao's memorandum in support of a stay in the Northern District of Texas states: "Instead of placing this Court in conflict with its brother court in Hawaii, Defendants should, if they believe their own arguments, move to intervene in the action in Hawaii. Since it is a Hawaiian state statute at issue, presumably the Hawaiian Federal Court has more experience in interpreting and applying it than a Texas court. In any event, there is no harm to the parties by staying the instant Motion until after the Federal Court in Hawaii addresses the issue on June 26. Depending on the decision by the Federal Court in Hawaii, Defendants may wish to pursue, modify or withdraw their Motion."

Hawaii can affect the MDL 840 Judgment in Texas – the first two have no relevance to intervention and the third cannot be right. Whether the MDL 840 Judgment is alive or dead is directly at issue in the Texas litigation. As Hilao acknowledges, it was this question that precipitated her request in MDL 840 for an extension, and, in turn, a request in the enforcement action for a stay. Her papers in the Northern District of Texas point out that a decision on this issue by the District of Hawaii will effectively pretermit the outcome of Revelstoke's motion to dismiss. In these circumstances, we are satisfied that Revelstoke has a significant interest that is protected by Hawai'i law, and that is actually affected as a practical matter by the resolution of Hilao's request for relief.

We are not persuaded otherwise by Hilao's position on appeal. She puts a good deal of weight on *United States v. Alisal Water Corp.*, 370 F.3d 915 (9th Cir. 2004), where a judgment creditor tried to intervene in an environmental enforcement action in which he had no interest except for the prospect that an award of penalties in the remedial phase might impair his ability to collect the debt. We thought this too remote from the core issues involved in the litigation, and in any event, believed the creditor's interest would not be impaired because a separate process for approving claims was in place. However, the *Alisal* scenario is quite different from the situation here. No doubt Revelstoke's interest (like the *Alisal* creditor's interest) would have been too distant for intervention

before Hilao invoked the District of Hawaii's jurisdiction over the MDL 840 Judgment in response to Revelstoke's position in the Northern District of Texas; but once Hilao sought relief with respect to the life of the judgment in MDL 840, and a stay with respect to the same issue in the Northern District of Texas where it initially surfaced, Revelstoke's conjectural interest became concrete.

By the same token, we see no compelling reason why Revelstoke cannot have a sufficient interest in the life of the judgment to intervene in a discrete proceeding as to that particular issue, even though it lacks an interest in the litigation as a whole. *Alisal* recognized this precise possibility. 370 F.3d at 921-22 (observing that prior cases suggest that a party's interest in a specific phase of a proceeding may support intervention at that particular stage of the lawsuit); *see also City of Los Angeles*, 288 F.3d at 398-99 (noting that an intervenor's protectable interest might shift if the scope of the litigation is restructured). Revelstoke's interest in participating in an MDL 840 proceeding did not arise until Hilao's motion to extend effectively transferred the forum for determining the life of the MDL 840 Judgment from the Northern District of Texas to the District of Hawaii. Absent that preemptive strike, the issue was before the Northern District of Texas for decision. The registering court could have resolved the issue itself – in which event Revelstoke would have had a place at the table – or elected to defer to the District of Hawaii by staying its hand until the parties had it out before

the court that had rendered the judgment – in which case Revelstoke would also have had a say. It follows that if Revelstoke's interest in having a judgment lien removed from its property enables it to contest enforceability of the judgment in the collection action itself, Revelstoke is entitled to do so wherever that issue turns out to be joined. As it turned out here, this was in MDL 840.

Finally, Hilao suggests that Revelstoke's interest is not entirely impaired or impeded because the district court's extension order has no direct effect on the eventual ruling of the Northern District of Texas. While this is so with respect to the *merits* of the enforcement action, her own papers suggest the opposite with respect to the threshold issue of whether the MDL 840 Judgment was alive at the time of registration. Of course we cannot say for sure what the Northern District of Texas will do once its stay is lifted, but Hilao's representation to that court manifests her belief that the registering court will defer to the rendering court on the issue of extending its own judgment. Hilao relies on cases where courts have rejected intervention founded on concerns about the *stare decisis* or collateral estoppel effect of a decision, such as *Bethune Plaza, Inc. v. Lumpkin,* 863 F.2d 525, 531-532 (7th Cir. 1988), and *Purcell v. BankAtlantic Financial Corp.,* 85 F.3d 1508, 1513 (11th Cir. 1996). But there is an important difference between a non-party's interest in avoiding bad precedent or obtaining a favorable opinion (the situation in *Bethune*) – or in influencing the outcome of another

proceeding in which one has only a collateral interest (the situation in *Purcell*) – and the interest that a real party in interest has in adjudicating an issue it has raised in one proceeding that lands in another proceeding for disposition. In the former case, the non-party's interest is abstract and indirect; in the latter case, the party's interest is particularized and direct.

Consequently, we conclude that Revelstoke asserts an interest in not having its property executed upon pursuant to a judgment that has expired; this interest is significant, and protected by law (HRS § 657-5 as applied through the Texas statute of limitations, Tex. Civ. Prac. & Rem. Code § 16.066(a)); and there is a direct relationship between its legally protected interest and Hilao's claim in the ancillary proceeding that the MDL 840 Judgment has *not* expired. This means that Revelstoke had a right to intervene and be heard on the merits.[5] We could remand, but see no point in doing so. Revelstoke seeks to protect its own interests, the merits are fully briefed, and no other party in MDL 840 has any interest in the controversy between Hilao and Revelstoke. Therefore, we turn to the order extending the MDL 840 judgment.

---

[5] Given this conclusion, we need not consider whether the district court also erred in denying permissive intervention under Rule 24(b).

III

Revelstoke argues that HRS § 657-5 means what it says: a judgment expires within ten years unless extended before expiration; that the Hawaii Supreme Court said so in *International Savings & Loan Ass'n v. Wiig*, 921 P.2d 117 (Haw. 1996); and that the district court clearly erred in resurrecting the MDL 840 Judgment in 2006 after it expired in February 2005. We agree. On its face, HRS § 657-5 plainly states that all judgments are extinguished after ten years unless timely renewed. The Hawai'i Supreme Court has authoritatively declared that the burden is on the judgment creditor to seek judicial extension of the judgment prior to expiration of the ten-year period, and that if she fails to secure an extension within the ten years, "the judgment and all the rights and remedies appurtenant to that judgment terminate." *Wiig*, 921 P.2d at 119.

Hilao does not argue to the contrary. Instead, she defends the order on other grounds, namely, the MDL 840 Judgment did not expire until January 8, 2007 when the Ninth Circuit's mandate issued; the MDL 840 Judgment was renewed, and thus extended, every time it was registered in another court; partial collection tolled or renewed the judgment; the MDL 840 Judgment is not governed by an Hawai'i statute; state statutes that would impede the ability of federal courts to ensure collectability of federal judgments based on federal causes of action cannot be enforced because of the Supremacy Clause; the judgment would not have lapsed in any event as it was not

"rendered" until January 8, 1997; and good cause existed for extending the MDL 840 Judgment. In effect, Hilao's position is that a federal judgment is free of state limitations and can be enforced forever. For this she cites no authority, and nothing she argues persuades us to accept her view.

Section 1963, the federal statute under which Hilao registered the MDL 840 Judgment in the Northern District of Texas for supplemental enforcement proceedings, has no limitations period. However, it does provide that a registered judgment "shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner." Rule 69(a) is to the same effect, providing that the procedure on execution is to be in accordance with the procedure of the state in which the district court is located at the time the remedy is sought. Likewise, the Rules of Decision Act, 28 U.S.C. § 1652, requires application of state statutes of limitations unless a timeliness rule drawn from elsewhere in federal law should be applied. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147 (1987) (so holding). This is the understanding upon which we, and other courts, have proceeded in similar circumstances, looking to the law of the registration forum for its statute of limitations on enforcement of judgments. *See, e.g., Duchek v. Jacobi,* 646 F.2d 415, 417 (9th Cir. 1981) (acknowledging rule that state law applies to procedures for enforcing a judgment); *Marx v. Go Publ'g Co.,* 721 F.2d 1272, 1273 (9th Cir. 1983) (applying limitations

law of the registering state); *Matanuska Valley Lines, Inc. v. Molitor,* 365 F.2d 358, 359-60 (9th Cir. 1966) (same).[6]

Marx and *Matanuska* are particularly instructive. In *Marx,* the plaintiff obtained a judgment against Go Publishing in the United States District Court for the District of Columbia which he registered, and sought to enforce, in the Central District of California. Go Publishing raised a statute of limitations defense based on the California period for enforcing judgments (ten years). We held, based on analogous California law, that the ten-year period runs from the time the judgment is registered, so long as the judgment is not time-barred at the time of registration. In so holding, we rejected an argument that state limitations rules are inapplicable where a district court judgment is registered under § 1963. 721 F.2d at 1273. In *Matanuska,* the plaintiff obtained a judgment in the United States District Court for the District of Alaska on July 26, 1956 and registered it pursuant to § 1963 in the Western District of Washington on September 10, 1964. Registration of the judgment was timely under the laws of Alaska, the rendering state, where the life of a judgment is ten years. However, under the laws of Washington, the registering state, a foreign judgment was not

---

[6] *See also, e.g., Stanford v. Utley,* 341 F.2d 265, 266 (8th Cir. 1965) (looking to forum law for the limitations period on enforcement of judgments); *Home Port Rentals, Inc. v. Int'l Yachting Group,* 252 F.3d 399, 406 (5th Cir. 2001) (same).

enforceable or registrable after the expiration of six years following its entry. We held that enforcement of the registered judgment was barred by the Washington statute of limitations. 365 F.2d at 360.

Relying on *Duchek,* Hilao posits that state law cannot divest a federal district court of jurisdiction to enforce its judgment. However, *Duchek* is inapposite. The Ducheks had obtained a judgment in the Central District of California, sued to set aside an allegedly fraudulent transfer of assets, and obtained another judgment that they sought to enforce. The defendants argued that because state law applied under Rule 69(a), the court lacked jurisdiction in light of a state venue statute that required a petition to enforce a judgment to be filed in the state superior court. We held that state legislation cannot withdraw federal jurisdiction. But this is neither the purpose, nor the effect, of applying the forum's statute of limitations for enforcing a judgment. It does not follow from the principle that state law cannot oust a federal court of subject matter jurisdiction, that no state law cutting off or curtailing a right – here, to enforce a judgment – may ever apply.

Stating the same thing somewhat differently, Hilao proposes that a federal judgment is renewed, and thereby extended, every time it is registered under § 1963 in another court. We agree with part of what she says: registering a judgment under § 1963 is the functional equivalent of obtaining a new judgment of the registration court. *See, e.g., Matanuska,* 365 F.2d at 360; *Marx,* 721 F.2d at 1273. The effect is

to allow *that* judgment, i.e., the newly registered judgment, to be enforced for the period allowed by the law of *that* forum, i.e., the state of registration, *if* the judgment were live, and thus registerable, at the time when it was registered. However, Hilao points to no authority suggesting that registration in one district – even if accomplished when the judgment was live – "extends" the statute of limitations in all districts.

Hilao maintains that the clock starts running on federal judgments after the time for appeal has expired. While this is true for many purposes such as finality of judgments, *see, e.g., Calderon v. United States District Court,* 128 F.3d 1283, 1286 n.2 (9th Cir. 1997), *overruled on other grounds by* 163 F.3d 530 (9th Cir. 1998), *abrogated on other grounds by Woodford v. Garceau,* 538 U.S. 202 (2003), the question here is the judgment's longevity. HRS § 657-5 provides that the limitations period begins to run on "the date the original judgment or decree was rendered." It does not say ten years from the date of entry *plus* however much time it takes to appeal.[7] Consistent with Hawai'i's policy that judgment creditors have ten years to attempt to collect from the date the judgment is rendered, enforcement of the MDL 840 Judgment began immediately.

---

[7] HRS § 657-5 caps the life of a judgment (properly extended) at twenty years, running from the same point: "A court shall not extend any judgment or decree beyond twenty years from the date of the original judgment or decree."

Neither *Borer v. Chapman,* 119 U.S. 587 (1887), nor *Home Port,* upon which Hilao rely, requires a different result. In *Borer,* the Court was concerned with a judgment entered *nunc pro tunc* whose terms were changed from the original judgment, and concluded that the statute of limitations did not begin to run until the judgment was in a form to be enforced. 119 U.S. at 602. *Home Port* noted that if a judgment is properly registered in one state, it may be enforced within the limitation period of that state even though the time for enforcement has run in the rendering state. In this context, the court characterized as "clearly specious" a contention that the rendering state's limitations period (which the defendant counted from the date of entry) applied. 252 F.3d at 406. While the statement can be read as critical of *both* contentions, i.e., that the rendering state's statute of limitations applied (there is no suggestion in *Home Port* that the registering state borrowed the rendering state's statute) *and* that the rendering state started counting from entry instead of after appeal, the court does not purport to adopt a rule that would be pertinent here.

Hilao contends, and the district court's order states, that HRS § 657-5 applies only to "domestic" judgments rendered by Hawai'i state courts. However, when a federal court borrows the most analogous state statute of limitations as a matter of federal law, the loan cannot turn on what the "most analogous" state statute says about its own applicability. *See, e.g., Home Port Rentals,* 252 F.3d at 403 n.5

(holding that a Louisiana statute of limitations which referred only to a "'money judgment rendered by a trial court of this State'" applied to judgments rendered by a federal district court in Louisiana); *Stanford,* 341 F.2d at 266 & n.2 (concluding that a Mississippi statute of limitations which referred to "'[a]ll actions founded on any judgment or decree rendered by any court of record in this state'" applied to a judgment rendered by a federal court in Mississippi).

Alternatively, Hilao submits that the running of the Hawai'i period of limitations was tolled by her collection efforts, and that in any event, good cause existed to extend the judgment for ten years because Marcos had a pattern and practice of fraudulently secreting his assets. Whether or not this is so, the extension was not sought before the MDL 840 Judgment expired. HRS § 657-5 contains no provision for revival, and the Hawai'i Supreme Court has held that its time limits are absolute. *Wiig,* 921 P.2d at 120 (ruling that the existence of other enforcement actions does not toll the time limits mandated by HRS § 657-5).

We conclude that the district court erred in extending the judgment pursuant to a request that was not made within ten years after the original judgment was rendered. None of the proffered reasons for bypassing this rule of Hawai'i law is convincing. Accordingly, having reversed the orders denying intervention as of right, and to appeal, and having considered the merits of the relief Hilao sought and

obtained in the District of Hawaii, we vacate the court's order of June 27, 2006.

REVERSED IN PART; VACATED IN PART.

APPENDIX B

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Attorneys for Plaintiff Class

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

IN RE: **ESTATE OF FERDINAND E. MARCOS HUMAN RIGHTS LITIGATION**	**MDL No. 840** **No. 86-390** **No. 86-330**
THIS DOCUMENT RELATES TO: **Hilao et al v. Estate of Ferdinand E. Marcos, and DeVera et al v. Estate of Ferdinand E. Marcos.**	**ORDER** (Filed June 27, 2006)

ORDER

The Court has carefully reviewed the Class Plaintiffs' Motion for Extension of Judgment and the record in this case. The Court finds as follows:

1. The Judgment rendered in the above action on February 3, 1995 was not final until issuance of the mandate of the Ninth Circuit was spread on the record of this Court on January 8, 1997.

2. Hawaii Revised State 657-5 provides in "[u]nless an extension is granted, every judgment and decree of any court of the state shall be presumed paid and discharged at the expiration of ten years after the judgment or decree was rendered." The statute also provides that a court may extend the ten year period for an additional ten years.

3. HRS 657-5 only applies to "domestic" judgments, that is, judgments rendered by Hawaii state courts. The federal Judgment rendered in this action was based on a federal cause of action. Federal court judgments have no expiration date.

4. Application of HRS 657-5 to federal court judgments on federal causes of action would be barred by the Supremacy Clause of the United States Constitution. Congress created a statutory regime for entry of and transfer of federal court judgments which would be impeded by HRS 657-5.

5. In the alternative, if HRS 657-5 were applicable, there is good cause to grant an extension of the Judgment. The Judgment will not be ten years old

until January 8, 2007. The Judgment is hereby extended for ten years from its tenth anniversary. This Court and the Ninth Circuit have held that Marcos had a pattern and practice to fraudulently secrete his assets and use off-shore corporations and cronies to hold title to property. Plaintiffs have exercised due diligence and exceptional efforts in attempting to identify assets to satisfy the judgment. This Court has held Imelda Marcos and Ferdinand R. Marcos in contempt for violating the terms of the permanent injunction by transferring assets. Marcos family members have failed to appear for deposition or produce documents regarding the identification and collection of assets to satisfy the Judgment.

6. The February 1999 Settlement Agreement is unaffected by this Order.

Dated: Honolulu, Hawaii, June 26, 2006

/s/ Real
The Honorable Manuel Real

APPENDIX C

MINUTES

CASE NUMBER:	CIVIL NO. 03-11111MLR
CASE NAME:	In Re: MDL 840 Marcos, et al.
ATTYS FOR PLA:	Robert Swift Sherry Broder John Van Dyke
ATTYS FOR DEFT:	Thomas Benedict
INTERPRETER:	

JUDGE:	Manuel L. Real	REPORTER:	Debra Chun
DATE:	06/26/2006	TIME:	10:25-10:40

COURT ACTION: EP: Joint Motion for Attorney Fees and Reimbursement of Expenses by Plaintiff's Counsel. Clarification to be submitted to the Court via memorandum regarding services and litigation costs in Singapore and meetings with government officials. Motion Granted. Swift to prepare Order.

Class' Motion for Extension of Judgment. Motion Granted.

Ex Parte MOTION for Hearing re MOTION to Intervene and Extension of June 26 Hearing Date on Class Motion for Extension of Judgment by B.N. Deveopment Co., Inc., Ellesmere Investment Corp., Inc., Jason Development Co., Inc., Langley Investment Corp., Inc., Pender Investment Corp., Inc., Revelstoke

Investment Corp., Inc., Vernon Investment Corp., Inc. Motion Denied and terminated.

MOTION to Intervene by B.N. Development Co., Inc., Ellesmere Investment Corp., Inc., Jason Development Co., Inc., Langley Investment Corp., Inc., Pender Investment Corp., Inc., Revelstoke Investment Corp., Inc., Vernon Investment Corp., Inc. Motion Denied and terminated.

Submitted by: Warren N. Nakamura, Courtroom Manager

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

In Re: ESTATE OF FERDINAND E. MARCOS HUMAN RIGHTS LITIGATION	MDL NO. 840 No. 86-390 No. 86-330 ORDER (Filed Jul. 3, 2006)
THIS DOCUMENT RELATES TO: Hilao, et al. v. Estate of Ferdinand E. Marcos, And De Vera, et al. v. Estate of Ferdinand E. Marcos	

ORDER

After consideration of Revelstoke Investment Corp., Inc.'s Motion to Intervene for Purpose of Appeal, and all other arguments or briefing thereon,

IT IS HEREBY ORDERED that Revelstoke Investment Corp., Inc.'s Motion to Intervene for Purpose of Appeal is ~~granted~~ [denied. This matter rests in the jurisdiction of the Texas litigation.]

Dated: Honolulu, Hawaii, June 27, 2006.

IT IS SO ORDERED.

/s/ Real

APPENDIX E

IN THE SUPREME COURT OF HAWAI'I

IN RE: **ESTATE OF FERDINAND E. MARCOS HUMAN RIGHTS LITIGATION** **MDL No. 840**	**MDL NO. 840** **CERTIFIED QUESTION** (Filed Sep. 26, 2008)
THIS DOCUMENT RELATES TO ALL ACTIONS	

The United States District Court for the District of Hawai'i sends its greetings to the Supreme Court of Hawai'i. In the above matter the District Court has determined that there is a question concerning the law of Hawai'i which is determinative of the cause and there is no clear controlling precedent in the Hawai'i judicial decisions. The question is:

> With regard to the time period for executing a judgment in H.R.S. § 657-5, does the time period begin after the appellate process is completed (because the appeal may provide relief in the form of damages not provided for in the original judgment and because the completion of the appellate process allows the judgment creditor to proceed without limitation to collect the judgment), or, in the alternative, given that an amended judgment establishes the relationship between

judgment creditor and debtor, does an amendment or modification of the original judgment (including an amended judgment providing for additional relief) start the time period anew?

Facts pertinent to this question are:

1. The Plaintiffs, the Estate of Francisco Sison and Jaime Piopongco, obtained individual judgments for damages against the Estate of Ferdinand E. Marcos on August 11, 1995 for human rights abuses. On that same day judgment was entered against Plaintiff Jose Maria Sison and in favor of the Estate of Ferdinand E. Marcos.

2. A final judgment as to all consolidated actions in MDL 840 pursuant to FRCP 58 was entered by the Clerk of the Court on December 6, 1995.

3. Plaintiffs Jose Maria Sison and Piopongco appealed their judgments and obtained a reversal which resulted in the entry of an amended final judgment in their favor on October 3, 1997. *Sison v. Estate of Marcos*, 1998 WL 789405 (9th Cir. 1998). The judgment was not entered *nunc pro tunc*.

4. On October 2, 2007 all three plaintiffs filed a motion to extend their judgments pursuant to Haw. Rev. Stat. 657-5.

5. Following hearing on September 12, 2008, the United States District Court decided to certify to

the Hawai'i Supreme Court the above stated issue of Hawai'i law.

BY THE COURT:

/s/ Real
MANUEL L. REAL
MDL 840 Transferee Judge

CERTIFIED AS A TRUE AND CORRECT
DOCUMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF HAWAI'I

SUE BEITIA
CLERK OF THE COURT

[SEAL]

APPENDIX F

NO. 29372

IN THE SUPREME COURT
OF THE STATE OF HAWAI'I

ESTATE OF FRANCISCO SISON,
JOSE MARIA SISON, and JAIME PIOPONGCO,
Plaintiffs-Appellants,

vs.

ESTATE OF FERDINAND E. MARCOS,
Defendant-Appellee.

ORIGINAL PROCEEDING

ORDER ON CERTIFIED QUESTION
(By: Moon, C.J., Nakayama, and Duffy, JJ.,
Intermediate Court of Appeals Judge Leonard,
in place of Levinson, J., recused, and
Intermediate Court of Appeals Judge Fujise,
in place of Acoba, J., recused)

(Filed Oct. 16, 2008)

Upon consideration of the order of the United States District Court for the District of Hawai'i requesting the Supreme Court of the State of Hawai'i to answer the certified question, it appears that the question is amenable to answer by this court pursuant to Hawai'i Rules of Appellate Procedure (HRAP Rule 13). Therefore,

IT IS HEREBY ORDERED, without conclusively determining whether this court will answer the question, that:

1. Pursuant to HRAP Rule 28(e), plaintiffs Estate of Francisco Sison, Jose Maria Sison, and Jaime Piopongco are designated the appellants for purposes of this proceeding and shall pay the required filing fee for an original proceeding in this court.

2. Defendant Estate of Ferdinand E. Marcos is designated the appellee for this proceeding.

3. Pursuant to HRAP Rule 13(c), Plaintiffs-Appellants shall make all necessary arrangements with the clerk of the United States District Court for the District of Hawai'i to transmit the original or certified copies of the pending federal court case to this court. It shall be the responsibility of Plaintiffs-Appellants to ensure that the record is received in this court within thirty days from the date of this order.

4. After the record is filed in the supreme court, Plaintiffs-Appellants shall file an opening brief within the time provided by HRAP Rule 28(b). The opening brief shall conform to the format and content requirements of HRAP Rule 28, insofar as applicable. A statement of jurisdiction pursuant to HRAP Rule 12.1 is not necessary.

5. Thereafter, Defendant-Appellee shall file an answering brief within the time provided by HRAP

Rule 28(c). The answering brief shall conform to the format and content requirements of HRAP Rule 28, insofar as applicable.

6. Plaintiffs-Appellants may file a reply brief in accordance with HRAP Rule 28(d).

DATED: Honolulu, Hawai'i, October 15, 2008.

/s/ Ronald T.Y. Moon

/s/ Paula A. Nakayama

/s/ James E. Duffy, Jr.

/s/ Katherine G. Leonard

/s/ Alexa D.M. Fujise

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: ESTATE OF FERDINAND E. MARCOS HUMAN RIGHTS LITIGATION,	No. 06-16301
CELSA HILAO, Plaintiff-Appellee, v. ESTATE OF FERDINAND MARCOS, Defendant-Appellee.	D.C. No. MDL-00840-MLR District of Hawaii, Honolulu
	ORDER
	(Filed Sep. 11, 2008)

Before: GOODWIN, RYMER, and IKUTA, Circuit Judges.

The panel has unanimously voted to deny appellees' petition for rehearing. Judge Rymer and Judge Ikuta voted to deny the petition for rehearing en banc and Judge Goodwin recommended denial of the petition for rehearing en banc. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

This petition for rehearing and the petition for rehearing en banc are DENIED.

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(2)

No. 08-1019

FILED
MAR 10 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

CELSA HILAO, *ET AL.*,

Petitioners,

v.

REVELSTOKE INVESTMENT CORPORATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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March 10, 2009

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QUESTION PRESENTED

Whether the court of appeals correctly applied Hawaii law in determining that a final judgment rendered by the United States District Court for the District of Hawaii expired and became unenforceable where no extension of the judgment was sought or granted within the ten-year limitations period imposed by Haw. Rev. Stat. § 657-5.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Revelstoke Investment Corp., Inc. is a privately held Delaware corporation. No publicly held company owns 10% or more of its stock. Its parent company is Western Pacific Investment Corp.

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INTRODUCTION

The court of appeals unanimously decided that a final judgment in favor of petitioners entered in February 1995 (the "1995 Class Judgment") expired in February 2005 under Haw. Rev. Stat. § 657-5, which imposes a strict 10-year limit for enforcing judgments that are not "extended" before expiration. The court of appeals based its ruling on the express terms of the Hawaii statute, decisions applying it, and the long-accepted principle that state limitations periods apply in the absence of a federal law supplying a deadline.

Petitioners identify no issue worthy of this Court's review. The dispositive question decided by the court of appeals — and fully addressed by the parties below — is the straightforward application of Hawaii's time limit for enforcing judgments. Petitioners themselves tendered that issue to the federal district court in Hawaii, and they never sought to certify the question to the Hawaii state courts. Now, however, petitioners ask this Court to "defer or hold decision on this Petition" (Pet. 4, 19-23, Question Presented 2) while they seek in another case to relitigate the same issue — which their counsel asked the district court to "certify" to the Supreme Court of Hawaii after the court of appeals rejected their position below. The petition, in short, not only raises questions of state law that are inappropriate for review by this Court, but also misuses the certiorari procedure as a tactic for relitigation and delay.

Nor are the supposed questions of federal law identified in the petition (*see* Questions Presented 1 and 3) worthy of review. Neither question was

presented to or decided by the courts below. Question 1, whether federal law rather than state law determines when a federal judgment "accrues" for "sunsetting purposes" (Pet. 11), is not the subject of any conflicting decisions of the circuits or any contradiction with this Court's decisions. And Question 3, whether the 1995 Class Judgment was truly a "final judgment," turns on a fact-bound argument and borders on the frivolous: Petitioners consistently (and correctly) treated the 1995 Class Judgment as a final judgment and enforced it as such from February 1995 onward; the court of appeals held that the judgment was final for purposes of appellate review upon entry and affirmed it in 1996; it was entered as a final judgment in the docket of the Hawaii district court in accordance with FRCP 58; and the result in this case would be the same even if petitioners prevailed on this issue.

STATEMENT

1. ***The Parties.*** Petitioners are plaintiffs in *Hilao v. Estate of Ferdinand Marcos* (Civ. A. No. 86-0390, D. Haw.), a class action alleging violations of the Alien Tort Claims Act, 28 U.S.C. § 1350. This class action was among a number of cases against the former President of the Philippines that were handled under multi-district litigation procedures in *In Re Estate of Ferdinand E. Marcos Human Rights Litigation*, MDL No. 840 (D. Haw.). On February 3, 1995, the Hawaii district court (Judge Real) entered the 1995 Class Judgment in favor of petitioners in a document entitled "Final Judgment," which states

that "[t]he Court enters final judgment pursuant to FRCP 58." (ER 1.)[1]

Respondent Revelstoke Investment Corp., Inc. owns real estate in Texas. Revelstoke is one of several corporations established by the late Jose Y. Campos, Sr. to hold investments for him and his family. Mr. Campos was a Filipino businessman who established successful pharmaceutical companies in the Philippines and made investments both in the Philippines and abroad.

This case arises because, in April 2005, petitioners registered the 1995 Class Judgment in the U.S. District Court for the Northern District of Texas under 28 U.S.C. § 1963 and commenced an enforcement action against Revelstoke and six affiliated corporations (the "Texas Action"). In that case, petitioners alleged that the real estate owned by the corporations belongs to the Marcos Estate and sought to execute on the properties to satisfy the 1995 Class Judgment. Revelstoke and the other corporations vigorously contested the allegations and, as described below, moved to dismiss the Texas Action on the ground that the 1995 Class Judgment was not extended within 10 years of entry and therefore expired and became unenforceable in February 2005 pursuant to Haw. Rev. Stat. § 657-5.

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[1] "ER" cites are to the "Excerpts of Record," which is the term used in the Ninth Circuit to refer to the appellate record filed with the court of appeals.

2. ***The Immediate Enforcement And Appeal of The 1995 Class Judgment.*** Shortly after entry of the 1995 Class Judgment on February 3, 1995, the Class moved for permission to enforce what they recognized to be "the Final Judgment" in their case.[2] On March 14, 1995, the district court granted the Class's motion, directed its clerk to "certify the Final Judgment of February 3, 1995 for transfer to other districts," and ruled that "there is no bar to execution on the Final Judgment . . . notwithstanding the pendency of any posttrial motions or appeals." (ER 16.) Petitioners promptly began to enforce the judgment.

After the district court denied post-trial motions, the Marcos Estate appealed on May 3, 1995, "from the Final Judgment entered in favor of the Plaintiff Class on February 3, 1995." (Doc. 608, Am. Notice of Appeal, *In re Estate*, MDL 840 (D. Haw.).) The Ninth Circuit held that it "ha[d] jurisdiction over the appeal pursuant to 28 U.S.C. § 1291," observing that "[o]n February 3, 1995, the district court entered final judgment in the class action suit" and that "[t]he Estate appeals from this judgment." *Hilao v. Estate of Marcos*, 103 F.3d 767, 772 (9th Cir. 1996).

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[2] (Doc. 578, Pls.' Mot. for Order Directing the Clerk to Certify the Final Judgment for Transfer to Other Districts, *In re Estate*, MDL 840 (D. Haw. filed Feb. 28, 1995).)

3. ***The Class's Attempt To Enforce The 1995 Class Judgment Against Respondent.*** In April 2005, the Class commenced the Texas Action by registering the 1995 Class Judgment pursuant to 28 U.S.C. § 1963 and filing an enforcement action in the Texas court against Revelstoke. (ER 43-79, Compl., *Del Prado v. B.N. Dev. Co.*, No. 05-234 (N.D. Tex. filed Apr. 8, 2005).)[3] The Class alleged that the 1995 Class Judgment was "rendered" February 3, 1995. (*Id.* ¶¶ 1, 4, 12.)

Counsel for Revelstoke informed the Class's counsel that Revelstoke would move to dismiss the Texas Action because the 1995 Class Judgment expired February 3, 2005, pursuant to Haw. Rev. Stat. § 657-5. (ER 38.) The Class had never sought or obtained an extension of the 1995 Class Judgment, so it could no longer be enforced under the express terms of the Hawaii statute, which provides:

> "Unless an extension is granted, every judgment and decree of any court of the State shall be presumed to be paid and discharged at the expiration of ten years after the judgment or decree was rendered. *No action shall be commenced after the expiration of ten years from the date a judgment or decree was rendered*

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[3] The original caption of this suit identifies Mariano Pimentel as Class representative. Romulo Del Prado was later appointed Class representative, and the caption was changed accordingly. We use the current caption when referring to this suit.

> *or extended.* No extension of a judgment or decree shall be granted unless the extension is sought within ten years of the date the original judgment or decree was rendered. A court shall not extend any judgment or decree beyond twenty years from the date of the original judgment or decree. No extension shall be granted without notice and the filing of a non-hearing motion or a hearing motion to extend the life of the judgment or decree." Haw. Rev. Stat. § 657-5 (emphasis added).

Without serving or otherwise notifying Revelstoke, the Class moved in the District of Hawaii for an out-of-time "extension" of the 1995 Class Judgment. (ER 17-23.) The court of appeals later characterized the Class's tactic as a "preemptive strike" designed to "pretermit the outcome of Revelstoke's motion to dismiss" the Texas Action and "transfer[ ] the forum for determining the life of the [1995 Class] Judgment . . . to . . . Hawaii." (Pet. App. 10a-11a.)

Upon learning of the Hawaii motion to extend, Revelstoke moved to intervene in the Hawaii district court for the limited purpose of opposing the extension motion. (ER 24-33.) During a hearing days later, Judge Real summarily granted the motion for an "extension" of the 1995 Class Judgment and then denied Revelstoke's motion to intervene. (ER 109-12.) Revelstoke promptly filed a second motion to intervene for the purpose of appealing the extension of the 1995 Class Judgment.

(ER 118-124.) Judge Real immediately denied that motion, too. (ER 125.) Revelstoke timely appealed.

Meanwhile, the Class successfully moved the Texas court to stay consideration of Revelstoke's motion to dismiss the Texas Action on the ground that the validity of the 1995 Class Judgment should be decided by a federal court in Hawaii: "'Since it is a Hawaiian state statute at issue, presumably the Hawaiian Federal Court has more experience in interpreting and applying it than a Texas court.'" (Pet. App. 9a n.4 (quoting Pls.' Mot. to Stay Briefing at 2).)

4. ***The Ninth Circuit's Decision Reversing The District Court.*** On July 31, 2008, the Ninth Circuit held that Revelstoke should have been allowed to intervene in the Hawaii district court to oppose the "extension" of the 1995 Class Judgment. On the merits, the court of appeals held:

> "that HRS § 657-5 means what it says: a judgment expires within ten years unless extended before expiration; that the Hawaii Supreme Court said so in *International Savings & Loan Ass'n v. Wiig*, 921 P.2d 117 (Haw. 1996); and that the district court clearly erred in resurrecting the [1995 Class] Judgment in 2006 after it expired in February 2005." (Pet. App. 14a.)

The court of appeals emphasized that the Hawaii statute "plainly states that all judgments are extinguished after ten years unless timely renewed" (*id.*), and that the Hawaii Supreme Court has confirmed this plain-meaning interpretation:

> "The Hawai'i Supreme Court has authoritatively declared that the burden is on the judgment creditor to seek judicial extension of the judgment prior to expiration of the ten-year period, and that if she fails to secure an extension within the ten years, 'the judgment and all the rights and remedies appurtenant to that judgment terminate.'" (Pet. App. 14a (quoting *Wiig*, 921 P.2d at 119).)

The court of appeals also rejected the Class's argument that the ten-year period was tolled until the 1995 Class Judgment was affirmed on appeal:

> "HRS § 657-5 provides that the limitations period begins to run on 'the date the original judgment or decree was rendered.' It does not say ten years from the date of entry *plus* however much time it takes to appeal." (Pet. App. 18a (quoting § 657-5) (emphasis in original).)

On September 11, 2008, the court of appeals unanimously denied the Class's petition for rehearing and rehearing *en banc*. (Pet. App. 34a.) None of the 28 judges eligible to vote for rehearing did so. (*Id.*) In their rehearing petition, the Class raised for the first time two questions that are presented in the petition for certiorari.[4]

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[4] Apart from rearguing issues previously presented to the court of appeals, the Class contended for the first time in its petition for rehearing (1) that the interpretation of Haw. Rev. (...continued)

5. ***Class Counsel's Efforts To Relitigate The Issues By Certification To The Hawaii Supreme Court In Another Case.*** Shortly after the Ninth Circuit ruled that the 1995 Class Judgment had expired, Class Counsel appeared before Judge Real in two other actions being handled in MDL 840: *Sison v. Marcos*, Civ. A. No. 86-225 (D. Haw.), and *Piopongco v. Marcos*, Civ. A. No. 87-138 (D. Haw.) (collectively, "*Sison-Piopongco*"). Class Counsel obtained an order from Judge Real in *Sison-Piopongco* "certifying" to the Hawaii Supreme Court the same question about the application of Haw. Rev. Stat. § 657-5 that the Ninth Circuit decided below against the Class in this case.

The certification order was issued in the following way: On October 2, 2007, just before the tenth anniversary of their own judgment, the *Sison-Piopongco* plaintiffs moved for an extension under § 657-5.[5] That motion was filed by Paul Hoffman,

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Stat. § 657-5 should be certified for decision to the Hawaii Supreme Court, and (2) that the limitations period under § 657-5 did not start running until December 6, 1995 because the 1995 Class Judgment was not really a final judgment under FRCP 58.

[5] The *Sison-Piopongco* plaintiffs "pursue[d] their claims directly" rather than as part of the Class, and their claims for compensatory damages "were tried separately" from those of the Class. *Hilao v. Estate*, 103 F.3d 789, 791 (9th Cir. 1996). Judge Real entered final judgment in *Sison-Piopongco* in August 1995, largely denying the plaintiffs' damages claims. The court of appeals reversed and remanded, *id.* at 793-94, and a new judgment was entered in favor of the *Sison-Piopongco* plaintiffs on October 3, 1997, awarding Sison $750,000 and Piopongco $250,000.

who represented the *Sison-Piopongco* plaintiffs but to our knowledge does not represent the Class. The motion languished for almost a year. But on September 12, 2008, the day after the Ninth Circuit denied the Class's petition for rehearing in this case, Judge Real heard the motion. At that hearing, Class Counsel appeared but Mr. Hoffman did not. Although no party had ever asked for certification of any question to the Hawaii Supreme Court, the district court suggested certification concerning § 657-5. Class Counsel responded: "Yes, Your Honor, that would be an excellent approach." (Tr. of Hr'g at 4:13-18 (D. Haw. Sept. 12, 2008).[6])

The courtroom clerk then spoke by telephone with Mr. Hoffman, who "didn't have notice of the hearing" and was "on vacation." (*Id.* at 5:19 – 6:2, 7:1-3.) Mr. Hoffman asked for a chance to brief the issues, but Judge Real refused: "Mr. Van Dyke [who argued for the Class in the court of appeals] is here for the class, and he indicates that he's amenable to the presentation to the Hawai'i Supreme Court." (*Id.* at 7:12-21.) It was then agreed that Class Counsel would "prepare . . . suggested language" for transmission to the Hawaii Supreme Court. (*Id.* at 9:3-10.)

The "language" prepared by Class Counsel and certified by Judge Real seeks the Hawaii Supreme

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[6] The transcript is available on the PACER website for the District of Hawaii, https://ecf.hid.uscourts.gov/cgi-bin/login.pl (last visited Mar. 8, 2009), under case number 03-11111 (which designates the MDL 840 docket entries that are available electronically).

Court's opinion on a question not presented by the *Sison-Piopongco* case, but which directly implicates the 1995 Class Judgment: whether *any* appellate review of a judgment on appeal tolls the ten-year period under § 657-5.[7] *Sison-Piopongco* does not present this broad issue because the original judgment in those cases had been reversed, and the motion to extend was filed less than ten years after entry of the *new judgment* on remand. In this case, by contrast, the 1995 Class Judgment was affirmed on appeal without modification.

Petitioners inaccurately assert that the Hawaii Supreme Court "has agreed to decide" the certified questions. (Pet. 19.) To the contrary, that court invited briefing of the issues but expressly stated that it was not yet "determining whether this court will answer the question." (Pet. App. 32a.) Revelstoke was granted leave and has filed an *amicus* brief to oppose the Class's efforts to obtain an advisory opinion on a hypothetical question that is not presented by the case and that would interpret § 657-5 differently from the carefully-reasoned decision of the Ninth Circuit.[8]

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[7] The certified question asks whether the limitations period under § 657-5 "begin[s] after the appellate process is completed." (Pet. App. 28a.)

[8] Order, *Estate of Francisco Sison v. Estate of Ferdinand E. Marcos*, No. 29372 (Haw. Feb. 17, 2009).

REASONS FOR DENYING THE WRIT

The petition for certiorari presents no issue worthy of this Court's review. Petitioners seek to use the certiorari procedure for the inappropriate purposes of contesting the Ninth Circuit's sound and straightforward interpretation of Hawaii state law and seeking a "deferral" from this Court while they try to relitigate in the Hawaii Supreme Court the same issues that they tendered to the federal courts below.

Furthermore, the other issues raised by petitioners were not presented to or decided by the courts below. None of the questions presents a conflict among the circuits or a departure from any decision of this Court.

I. THE STATE LAW ISSUE DECIDED BY THE COURT OF APPEALS WARRANTS NEITHER REVIEW NOR "DEFERRAL."

Review is inappropriate — as is any delay in disposing of the petition — because the court of appeals decided an issue of state law. The Class concedes that the court below "bas[ed] its ruling entirely on a Hawai'i statute," but challenges "[t]he court of appeals' interpretation and application of [Haw. Rev. Stat. § 657-5]." (Pet. 3-4.) The Ninth Circuit's interpretation of Hawaii law would not warrant review or deferral even if it were not so manifestly correct.

1. This Court "accord[s] great deference to the interpretation and application of state law by the Courts of Appeals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 816 n.12 (1984); *see also, e.g., McMillian v.*

Monroe County, Ala., 520 U.S. 781, 786 (1997). Only "in exceptional cases" does this Court review "the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). Petitioners fail to identify any respect in which the interpretation and application of Haw. Rev. Stat. § 657-5 by the court of appeals raises "exceptional" circumstances calling for special review.

2. This Court should not "hold" the petition on the asserted ground that the Hawaii Supreme Court "has agreed to decide" the questions certified by Judge Real in the *Sison-Piopongco* case. (Pet. 19.)

As an initial matter, the Hawaii court has not "agreed to decide" anything; rather, it invited briefing before "determining whether [it] will answer the [certified] question." (Pet. App. 32a.) It may well decline to answer the question that is not genuinely presented by the *Sison-Piopongco* case: whether the Ninth Circuit was correct that the 10-year time limit for enforcement of a judgment under Haw. Rev. Stat. § 657-5 is not tolled by appellate proceedings resulting in affirmance of the judgment.

Indeed, answering that hypothetical question would be inconsistent with the Hawaii Supreme Court's self-recognized "'duty'" not to "'declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *State v. Matavale*, 166 P.3d 322, 342 n.15 (Haw. 2007) (quoting *Wong v. Bd. of Regents, Univ. of Haw.*, 616 P.2d 201, 204 (Haw. 1980)). An answer to that

question could not affect the *Sison-Piopongco* plaintiffs' extension motion.[9] When the Hawaii Supreme Court perceives that a tendered questions is hypothetical after briefs are submitted, it does not answer the question. *See Matsuura v. E.I. Du Pont de Nemours & Co.*, 73 P.3d 687, 706 (2003) ("insofar as [a] certified question d[id] not appear to be 'determinative of the cause,' it was inappropriate for certification under HRAP Rule 13" and the court "decline[d] to answer it").[10]

3. Petitioners mischaracterize the authority that they offer to support their request that this Court "defer or hold decision" on the petition. The cases they cite involve the different situation in which "awaiting the position of a state's highest court" may clarify whether this Court has *jurisdiction* to review a decision. (Pet. 22.)

In *Lynum v. Illinois*, 368 U.S. 908 (1961), and *Herb v. Pitcairn*, 324 U.S. 117 (1945), this Court did not "hold" a certiorari petition because a ruling in *another* case might produce a new interpretation of

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[9] As previously noted, the original August 1995 judgment in *Sison-Piopongco* was *reversed* on appeal in December 1996, *see Hilao*, 103 F.3d F.3d 789 at 793-94, and the new judgment was entered on remand in October 1997. The *Sison-Piopongco* plaintiffs' extension motion was filed October 2, 2007, less than ten years after entry of the new judgment on remand.

[10] Moreover, as explained below (*see infra* at 15-17), the decision of the court of appeals on the first certified question follows two unanimous Hawaii Supreme Court opinions, which makes certification unnecessary. *See* Haw. R. App. P. 13 (limiting certification to situations where "there is no clear controlling precedent in the Hawai'i judicial decisions").

state law. This Court instead deferred consideration because it was unclear whether the decision on which certiorari was sought rested on "an adequate and independent state ground," so that explanation by the state supreme court would clarify "whether the decision of [a] federal [claim] . . . was necessary to the judgment rendered." *Lynum*, 368 U.S. at 908; *Herb*, 324 U.S. 128.

Here, by contrast, (i) petitioners seek "deferral" based on a possible decision in a different case pending in state court, (ii) the decision below was rendered by a federal appellate court, not the state supreme court, (iii) that decision expressly turns on the interpretation and application of a state statute, and (iv) petitioners concede that the decision was based "entirely" on state law (*see* Pet. 3). Moreover, no case cited by petitioners involves a situation where, as here, the delay is sought in aid of efforts to relitigate the same issues decided by the court below.

4. Petitioners also disregard that the Ninth Circuit's interpretation of Haw. Rev. Stat. § 657-5 accords not only with the plain meaning of the statute, but also with two unanimous opinions of the Hawaii Supreme Court holding that § 657-5 imposes a strict limitations period that runs from the date a judgment is entered by the trial court.

Brooks v. Minn, 836 P.2d 1081 (Haw. 1992), holds that a judgment is "rendered" under § 657-5 when it is "entered" on the docket, so "the ten-year [limitations period] runs from the date the judgment was entered." 836 P.2d at 1086-87 & n.10. The judgment in *Brooks* "was filed on February 9, 1981,"

so the judgment creditor "had until February 9, 1991" to enforce it. *Id.* at 1087.[11]

Similarly, *International Savings & Loan Ass'n, Ltd. v. Wiig*, 921 P.2d 117, 118-19 (Haw. 1996), confirms that § 657-5 imposes an unyielding, bright-line limitation rule that allows no exception:

> "HRS § 657-5 places the burden on the judgment creditor to seek judicial extension of the judgment prior to the expiration of the ten year statutory period; otherwise, the judgment is presumed to be 'paid and discharged' as a matter of law." *Id.* at 119.

Wiig emphasizes that "HRS § 657-5 is a statute of repose that compels the exercise of a right within the statutorily defined period of time." *Id.*[12]

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[11] The precise date on which the limitations period began running was important in *Brooks* because the judgment incorporated a promissory note providing for interest from the effective date of the note. The Court ruled that the judgment creditor was "entitled to recover . . . interest as provided in the Note *from the date the [judgment] was entered* on February 9, 1981," not from the date the judgment debtor's right to appeal expired. 836 P.2d at 1087 (emphasis added).

[12] *Wiig* held that the ten-year clock started when a judgment was entered by the trial court on March 8, 1984, not when the time for appeal expired: "[P]ursuant to the plain language of HRS § 657-5, the judgment expired on March 8, 1994 – ten years after the original judgment was rendered." 921 P.2d at 118-19. The judgment creditor argued that a garnishment order obtained months after the judgment's entry "'tolled' the life of the judgment beyond the ten year period." *Id.* The Hawaii Supreme Court disagreed, rejecting the view that (...continued)

Thus, "[i]f the judgment creditor fails to secure the extension within the ten years, the judgment and all the rights and remedies appurtenant to that judgment terminate." *Id.*[13]

Citing *Wiig*, the Ninth Circuit held that Haw. Rev. Stat. § 657-5 "means what it says: a judgment expires within ten years unless extended before expiration." (Pet. App. 14a.) In doing so, the court of appeals applied the plain language of § 657-5, which "provides that the limitations period begins to run on 'the date the original judgment or decree was rendered'" and "does not say ten years from the date of entry *plus* however much time it takes to appeal." (Pet. App. 18a (quoting § 657-5).)

Contrary to petitioners' assertion, the court of appeals did not regard any issue of Hawaii law as "novel." (Pet. 21.) The full sentence quoted by the

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"a garnishment proceeding or any other enforcement action 'tolls' the time limitation imposed by HRS § 657-5." *Id.* at 120.

[13] Further evidencing that the ten-year limit imposed by Haw. Rev. Stat. § 657-5 is unyielding, the Intermediate Court of Appeals of Hawaii recently held that the statute "creates a limitation period that commences on the original judgment's entry date" even when the judgment is partially *reversed* and partially *vacated* on appeal. *Estate of Roxas v. Marcos*, No. 28702, --- P.3d ---, 2009 WL 352878, at *4-5 (Haw. Ct. App. Feb. 12, 2009), *mot. for reconsideration denied*, 2009 WL 550882, at *1 (Haw. Ct. App. Mar. 2, 2009) (table).

In contrast, the recent Hawaii opinion cited by the Class, *Beecher Limited v. Alvarez & Marsal North America, LLC*, No. 28011, 2008 WL 616287, 187 P.3d 593 (Haw. App. Mar. 7, 2008) (table) (*see* Pet. 21-22 n.9), does not apply Haw. Rev. Stat. § 657-5 and is an "unpublished dispositional order" that "shall not be cited in any other action or proceeding," Haw. R. App. P. 35(c)(1).

Class describes only the facts of this case as "novel." (*See* Pet. App. 2a ("This appeal requires us to consider a novel situation involving the registration of a federal judgment.").)

II. THE QUESTIONS PRESENTED IN THE PETITION WERE NOT PROPERLY RAISED OR PASSED UPON BELOW.

The petition overlooks that this Court ordinarily does not review questions that were not properly presented to, or decided by, the courts below. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (declining to "allow a petitioner to assert new substantive arguments attacking . . . the judgment [below] when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it"); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

1. To have properly presented an issue to the courts below, petitioners must have done so before the court of appeals ruled on the merits. Arguments are "waived" when they are presented for the first time in a rehearing petition in the absence of good grounds for the delay. *See, e.g., Picazo v. Alameida*, 366 F.3d 971, 972 (9th Cir. 2004); *Talk of the Town v. Dep't of Fin. & Bus. Servs.*, 353 F.3d 650, 650 (9th Cir. 2003). This Court recognizes the same rule: "[i]t has been the traditional practice of this Court . . . to decline to review claims raised for the first time on rehearing in the court below." *Wills v. Texas*, 114 S. Ct. 1867, 1867 (1994) (O'Connor, J., concurring in the denial of the petition for certiorari),

see also Hoover v. Ronwin, 466 U.S. 558, 574 (1984) (declining to address respondent's constitutional argument that was "made . . . for the first time in . . . response to petitioners' motion for rehearing in the Court of Appeals"; the "failure to raise this issue in a timely manner precludes our consideration").

2. None of the questions presented by petitioners was properly raised before or decided by the Ninth Circuit. Until its petition for certiorari, the Class never argued that "[f]ederal statutory or common law" creates a "federal law accrual rule" that determines when the limitations period under Haw. Rev. Stat. § 657-5 began running for the 1995 Class Judgment. (Pet. 3-4, 11-19.)[14] In the courts below, petitioners made the different argument that the Supremacy Clause overrides the Hawaii statute.[15] Petitioners appear to have abandoned that argument, perhaps because every court of appeals to

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[14] This is not a situation where a certiorari petition makes a new argument in support of a claim raised below. *Compare Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) (petitioners who claimed "Takings Clause" violation in lower courts could make "regulatory taking argument" and "physical taking argument" in this Court, even though it was "unclear" if former was raised below, because these were "separate *arguments* in support of a single claim") (emphasis in original). Although the Class argued below that the limitations period did not start until after affirmance of the 1995 Class Judgment and cited some of the cases it cites here (*see* Class Br. at 2, 19-24, *Hilao v. Estate of Ferdinand Marcos*, No. 06-16301 (9th Cir. filed Aug. 25, 2006) ("Class 9th Cir. Br.")), the Class never raised a claim based on "[f]ederal statutory or common law" and never suggested the existence of a "federal law accrual rule." (Pet. 3-4, 11-19.)

[15] (*See* Pet. App. 14a; Class 9th Cir. Br. at 2, 31.)

consider the issue has held that, pursuant to FRCP 69(a)(1), the forum state's law limits the period for enforcing a federal court judgment where no federal statute imposes a deadline. *See, e.g., Andrews v. Roadway Express*, 473 F.3d 565, 567, 569 n.4 (5th Cir. 2006) (Texas law); *Home Port Rentals, Inc. v. Int'l Yachting Group, Inc.*, 252 F.3d 399, 408 & n.23 (5th Cir. 2001) (Louisiana law); *United States v. Fiorella*, 869 F.2d 1425, 1426 & n.5 (11th Cir. 1989) (Alabama law); *Matanuska Valley Lines, Inc. v. Molitor*, 365 F.2d 358, 360 (9th Cir. 1966) (Washington law).[16]

3. Petitioners also concede that they did not request certification of state law issues to the Hawaii Supreme Court or present an argument based on FRCP 58 until their "motion for rehearing" in the court of appeals. (Pet. 4, 10.) It was petitioners who tendered the interpretation of Haw. Rev. Stat. § 657-5 to the courts below, and they never suggested "certification" to the state courts until they had fully litigated the issue and lost. Similarly, petitioners treated the 1995 Class Judgment as a final judgment under Rule 58 from 1995 to 2008 — again, until they lost in the court below and seized on the new contention that it was not really a final judgment.

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[16] The Class erroneously implies that a federal judgment "on a federal cause of action" is subject to limitations principles different from those that apply to a federal judgment on a state cause of action. (Pet. 14.) Rule 69(a)(1) makes no such distinction. Every federal court judgment is subject to state law for enforcement purposes (absent a specific provision of federal law to the contrary), regardless of the cause of action on which the judgment is based.

III. THE FEDERAL LAW ISSUES RAISED IN THE PETITION INVOLVE NO CONFLICT AMONG THE COURTS OF APPEALS OR WITH DECISIONS OF THIS COURT.

The Ninth Circuit's application of Haw. Rev. Stat. § 657-5 does not conflict with a decision of another court of appeals or of this Court with respect to either federal issue that petitioners raise.

A. The Decision Below Does Not Conflict With Any Federal Decision Addressing Time Limitations On the Enforceability of Federal Court Judgments.

Petitioners argue that the Ninth Circuit's application of § 657-5 to the 1995 Class Judgment conflicts with decisions of other courts of appeals and of this Court holding that federal law determines when a state limitations period begins running on a federal court judgment. (Pet. 3-4, 11-19.) None of the opinions cited by the Class so holds, and none establishes or applies a "federal law accrual rule" for state limitations periods on judgments. (Pet. 4.)

As the Ninth Circuit correctly observed, FRCP 69(a)(1) provides that "the procedure on execution is to be in accordance with the procedure of the state in which the district court is located." (Pet. App. 15a.)[17]

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[17] FRCP 69(a)(1) states: "A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution – and in proceedings supplementary to and in aid of judgment or execution – must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies."

Under this principle, and under the Rules of Decision Act, 28 U.S.C. § 1652, the forum state's law limits the life of a judgment "unless a timeliness rule drawn from elsewhere in federal law should be applied." (Pet. App. 15a.) Petitioners disregard this well-settled principle and rely on cases addressing questions other than enforcement of judgments rendered by federal courts.

Thus, petitioners make the uncontroversial and irrelevant point that "Federal law has always controlled when a federal judgment is deemed 'final' for purposes of appeal." (Pet. 11.) Similarly, they cite cases holding that the "accru[al]" of federal *causes of action* — not judgments — is determined by "federal common law." (*Id.*)[18] The question decided below (and presented here) is not the time of accrual of the petitioners' causes of action, which were ultimately upheld in the 1995 Class Judgment, but the time period within which that judgment could be enforced under Hawaii state law, which controls under FRCP 69(a) and the Rules of Decision Act.

Petitioners come closer to addressing relevant points when they contend that three decisions involving limitation periods on enforcement of

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[18] (*See* Pet. 11-12 (citing *Wallace v. Kato*, 549 U.S. 348, 388 (2007) ("the accrual date of a § 1983 cause of action is a question of federal law"); *Romero v. Allstate Corp.*, 404 F.3d 212, 221 (3d. Cir. 2005) ("The date of accrual of the ERISA non-fiduciary duty claims asserted is determined as a matter of federal common law."); *Tolle v. Carroll Touch*, 977 F.2d 1129, 1138 (7th Cir. 1992) ("we look to federal common law for purposes of deciphering the accrual date of a cause of action under a federal statute")).)

judgments conflict with the decision below. (Pet. 12-15, 19.) The court of appeals distinguished two of these cases: *Borer v. Chapman*, 119 U.S. 587 (1887), and *Home Port Rentals, Inc. v. International Yachting Group, Inc.*, 252 F.3d 399 (5th Cir. 2001). (Pet. App. 19a.) Petitioners did not cite the third case, *Jalapeno Property Management, LLC v. Dukas*, 265 F.3d 506 (6th Cir. 2001), until their certiorari petition. None of the three cases holds that a state statute limiting lives of judgments "does not begin to run on a federal judgment until all appeals are final" (Pet. 3), and there is no conflict between those cases and the decision below.

1. ***Borer***

In *Borer*, the trial court entered a judgment on April 19, 1872, which this Court "reversed and remanded." 119 U.S. at 593, 601-02. A corrected, final judgment was entered "on December 18, 1878," and was made *nunc pro tunc* "as of July 10, 1871." *Id.* at 596, 602. This Court held that the limitations period for enforcement did not begin running on July 10, 1871 because "[t]he date of that entry is by a fiction of the law" and "the right of [the judgment creditor] to enforce th[e] judgment" should run from the entry of the new judgment on remand that was "actually entered on December 18, 1878." *Id.* at 602.

In contrast, the 1995 Class Judgment (i) was never suspended, reversed, or vacated, (ii) is not a *nunc pro tunc* judgment, (iii) was ruled immediately enforceable by the rendering court, and (iv) was enforced by the Class "immediately" after entry (Pet. App. 18a). Nothing in *Borer* suggests that "the state time period to enforce a federal judgment d[oes] not begin to run until all appeals [a]re completed." (Pet.

12.)[19] *Borer* also antedated the adoption of FRCP 69(a)(1) and therefore did not address that rule's principle that state law governs enforcement of judgments.

2. *Home Port Rentals*

Petitioners are also incorrect in asserting that the decision below conflicts with *Home Port Rentals*. That case does not apply a federal law rule that limitations periods for enforcing judgments are tolled until "all appeals are completed or the time for appeal has expired." (Pet. 13.) Instead, *Home Port Rentals* holds that, where a "live" (*i.e.*, unexpired) judgment was registered in Louisiana under 28 U.S.C. § 1963, Louisiana's limitations period governed enforcement of the judgment in that state and began running on the date of registration.

The judgment in *Home Port Rentals* was entered by the South Carolina federal court on March 20, 1989, was affirmed by the Fourth Circuit on April 2, 1992, and was registered in a Louisiana federal court on March 17, 1999. 252 F.3d at 402. On the date of registration, the judgment was "enforceable" in "both the rendering and the

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[19] The enforcement action in *Borer* "was filed August 20, 1879," within one year after entry of the corrected, final judgment. 119 U.S. at 601. The Court thus did not need to consider application of a Minnesota statute providing that enforcement actions be "commenced within one year from the time the claim is allowed or established." *Id.* The Court noted that "[w]hether that statute has any application to this bill in equity . . . is a question which need not be considered or decided." *Id.* at 603

registration jurisdictions," as each had a ten-year limitations period. *Id.* at 403-04 & nn. 4-5.

The Fifth Circuit held that Louisiana's limitations period governed pursuant to the final sentence in § 1963, which states: "'A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.'" *Id.* at 406 (quoting § 1963). The same sentence was decisive in determining "*when* Louisiana's [limitations] clock started to tick": "enforcement proceedings following registration are governed exclusively by the limitation rules of the state in which the registration district is situated," and "in Louisiana, that period starts to run on the date the judgment is *registered*." *Id.* at 406-08 & n.23 (citing Fed. R. Civ. P. 69) (emphases in original).

Petitioners quote the words "clearly specious" from *Home Port Rentals* out of context. (Pet. 13.) The opinion uses those words in discussing which state's law applied, not in regard to when the applicable state limitations period began running. 252 F.3d at 406. Because the judgment had been registered in Louisiana before it expired in South Carolina, it could be "enforced within the limitation period of [Louisiana] even though the time for enforcement ha[d] run in [South Carolina]" after the registration in Louisiana. *Id.* The judgment debtor's "contention that South Carolina's statute of limitations" controlled enforcement in Louisiana was "clearly specious" because the judgment was "live" when it was registered (unlike the expired 1995 Class Judgment when it was registered in Texas) and the governing Louisiana statute did not look to

the rendering jurisdiction's limitations period (unlike the borrowing provision governing the Texas Action, Tex. Civ. Prac. & Rem. Code § 16.066(a)). *Home Port Rentals*, 252 F.3d at 406.

3. *Jalapeno*

Nor does the decision below conflict with *Jalapeno*. The Class asserts that *Jalapeno* "appl[ied] federal common law" to hold that state limitations periods on judgments "do not begin [to run] until after the mandate issues following an appeal." (Pet. 13.) *Jalapeno* does not hold that an appeal must end before a state limitations period on a judgment begins running, much less apply "federal common law" to that effect. Instead, *Jalapeno* addresses the different question whether a limitations period on enforcement began running upon entry of a judgment that remained "'subject to revision' by the district court" and that was neither final nor appealable. 265 F.3d at 513-14 (quoting FRCP 54(b)).

Whereas the judgment in *Jalapeno* "lacked a certification of finality," *id.* at 508, 511, the 1995 Class Judgment is titled "Final Judgment" and by its terms "enters final judgment pursuant to FRCP 58" in favor of the Class (ER 1). Petitioners try to sidestep these points by arguing that the 1995 Class Judgment was only "signed" February 3, 1995 (*e.g.*, Pet. 5-7, 9) and that it was not really "entered" until December 6, 1995 (*e.g.*, Pet. 5, 7). They ignore that the top-right corner of the first page of the 1995 Class Judgment (ER 1) and the pertinent docket entry (ER 181) each confirm that the judgment was entered February 3, 1995.

Petitioners likewise ignore that the 1995 Class Judgment entered February 3, 1995 was appealed as a final judgment in 1995, was held to be such by the Ninth Circuit, and was enforced by petitioners as a final judgment immediately after entry.[20] In *Jalapeno*, by contrast, the entry of a non-final judgment subject to revision precluded an appeal.[21]

B. Petitioners' New Position That The 1995 Class Judgment Is Not A Final Judgment Is Baseless, Contradicts Their Longstanding Position, Is Supported By No Federal Appellate Decision, And Would Not Change The Result Even If It Were Correct.

Petitioners' past positions and conduct belie their new contention that the 1995 Class Judgment

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[20] The Marcos Estate appealed "from the Final Judgment entered in favor of the Plaintiff Class on February 3, 1995" (Doc. 608, Am. Notice of Appeal, *In re Estate*, MDL 840 (D. Haw. filed May 3, 1995)) – *i.e.*, from the 1995 Class Judgment. The court of appeals determined that the "final judgment in the class action suit" was entered "[o]n February 3, 1995" and held that it "ha[d] jurisdiction over the appeal pursuant to 28 U.S.C. § 1291," *Hilao*, 103 F.3d 767 at 771-72. Far from disputing these points, petitioners moved on February 28, 1995 for authorization to enforce the 1995 Class Judgment immediately, their motion was granted, and they continued enforcing the judgment while the Estate's appeal was pending. *See, e.g.*, *Hilao v. Estate of Marcos*, 95 F.3d 848, 850 (9th Cir. 1996); *In re Estate of Marcos*, 963 P.2d 1124, 1128 (Haw. 1998).

[21] The Sixth Circuit ruled that the judgment in *Jalapeno* did not become final "until the termination of the litigation against the remaining defendants," which did not occur "until after this court had issued its second mandate . . . which concluded the litigation as to 'the rights and liabilities of all the parties.'" 265 F.3d at 514 (quoting Fed. R. Civ. P. 54(b)).

entered on February 3, 1995 was not really a final judgment and that the final judgment was actually entered on December 6, 1995. (Pet. 23-29.) This remarkable revisionist history ignores that petitioners themselves treated the 1995 Class Judgment as a final judgment for many years: Petitioners moved for authorization to begin enforcing it in February 1995, and their motion was granted two weeks later; petitioners enforced it as soon as they were authorized to do so and continued doing so while it was on appeal[22]; the Ninth Circuit held that it was a final judgment in 1996 when it exercised appellate jurisdiction and affirmed it, *Hilao*, 103 F.3d 767 at 772; and petitioners registered it and filed the Texas Action in 2005 based on the specific allegation that it was an enforceable final judgment.

Petitioners do not explain why the fact-bound question whether the judgment was entered February 3, 1995 or December 6, 1995 warrants review. Nor do they acknowledge that it would make no difference even if their new position were correct: They never registered or sought to extend the

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[22] By the time the Marcos Estate appealed the 1995 Class Judgment, the Class had registered the judgment and begun executing on it, both in Hawaii and in other jurisdictions, and the Class continued such enforcement efforts while the appeal was pending. *See, e.g.*, *Hilao*, 95 F.3d at 850 (in May 1995, the Class "registered its Hawai'i judgment against the Estate in the Central District of California" and served "writs of execution" on banks in Los Angeles); *In re Estate of Marcos*, 963 P.2d at 1128 (in November 1995, the district court "grant[ed] the [Class's] motion for a writ of execution," holding that a car "was to be seized and sold to satisfy a portion of the [Class's] judgment against the Marcos Estate").

purported December 1995 judgment, so it would have expired and become unenforceable more than three years ago.[23]

In any event, their new position is not correct. The district court's docket reflects that the "separate document" and other formal requirements for entering judgment under FRCP 58 were all satisfied as of February 3, 1995:

- The first page of the 1995 Class Judgment states that "[t]he Court enters final judgment pursuant to FRCP 58." (ER 1.)

- The 1995 Class Judgment was entered on the district court's docket on February 3, 1995 as follows: "FINAL JUDGMENT — on behalf of Plaintiffs — **REAL**." (ER 181, Doc. 568, MDL 840 (D. Haw.).)

- The 1995 Class Judgment is "a separate document" (*i.e.*, a document "distinct from any opinion or memorandum") and the district court's clerk "promptly prepare[d],

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[23] Petitioners assert that because they registered the 1995 Class Judgment in April 2005, less than 10 years after December 6, 1995, they should be allowed to enforce the December 1995 judgment. (Pet. 23, 29.) But petitioners registered only the 1995 Class Judgment entered February 3, 1995, not the supposed December 1995 judgment. In any event, petitioners did not even mention the possibility of registering the December 1995 judgment until after the Ninth Circuit ruled against them in July 2008. By then, no December 1995 judgment could be registered because it was never extended under Haw. Rev. Stat. § 657-5 and therefore would have expired in December 2005.

> sign[ed], and enter[ed] the judgment" in the court's "civil docket." Fed. R. Civ. P. 58(a), (b)(1), (c)(2) & advisory committee's note.

Nor do petitioners identify any conflict between the decision below and other federal decisions applying FRCP 58. They cite no federal decision suggesting that Rule 58 may be applied retrospectively to undo a final judgment that was fully litigated on appeal, affirmed, and enforced against the judgment debtor. Indeed, this Court has held that the "sole purpose of the separate-document requirement, which was added to Rule 58 in 1963, was to clarify when the time for appeal . . . begins to run." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 (1978).

There is no conflict between the decision below and *United States v. Indrelunas*, 411 U.S. 216, 220 (1973), which also recognized that Rule 58's formalities were designed to cure the "considerable uncertainty over what actions of the District Court would constitute an entry of judgment" for purposes of appeal. *Indrelunas* held that a docket entry recording that the jury had entered a verdict was not an entry of judgment so that the Government's notice of appeal filed after issuance of separate, written "formal judgments" more than eight months later was timely. *Id.* at 218-19, 221. The same procedure was followed in this case: The docket recorded a jury verdict for the Class on January 18, 1995, and a separate, written document entitled "Final Judgment" dated February 3, 1995, was signed by Judge Real, endorsed by the clerk, and entered on the docket. (ER 177, Doc. 562, MDL 840 (D. Haw.);

ER 181, Doc. 568, MDL 840 (D. Haw.).) Notably, petitioners' list of relevant document entries (Pet. 26-27) omits docket entries showing that the 1995 Class Judgment was a final judgment upon entry, undermining their assertion that "the judgment was not in a form to be enforced until December 6, 1995." (Pet. 29.)[24]

Nor does the decision of the court of appeals conflict with FRCP 54(b) or any federal decision applying it. In arguing that the 1995 Class Judgment was interlocutory because it did not embrace the claims of other parties to the case, petitioners confuse the case brought by the Class (Civ. A. No. 86-390, D. Haw.) with other cases that were handled under the multi-district procedures in MDL 840 (such as *Sison-Piopongco*) in which final judgment was entered later.

Because the 1995 Class Judgment fully adjudicated the claims brought by the Class in their particular case, Judge Real expressly "enter[ed] final judgment pursuant to FRCP 58 in favor of 135 randomly selected Class Claims and the Plaintiff Class" in Civil Action No. 86-0390. (ER 1.) It bears repeating that petitioners not only acquiesced in entry of that judgment, but successfully moved for an order that enabled them to enforce it immediately.

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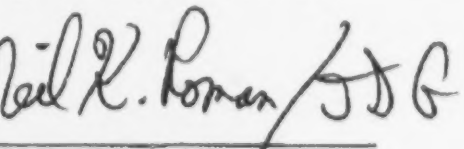
[24] Petitioners omit: (i) the Class's motion of February 28, 1995 for authorization to enforce the judgment immediately (ER 182), (ii) Judge Real's order of March 14, 1995 authorizing immediate enforcement of the judgment (ER 15-16), and the notice of appeal from the judgment filed by the Marcos Estate on May 1, 1995 (ER 185).

Neither of the cases involving FRCP 54(b) cited by petitioners casts any doubt on the finality of the 1995 Class Judgment. (Pet. 28.) *Reiter v. Cooper*, 507 U.S. 258, 270 (1993), simply held that a judgment entered on a plaintiff's claims is unappealable where the defendant's counterclaims remain unadjudicated and the court has not made the "express determination" required by Rule 54(b). And *Huene v. United States*, 743 F.2d 703 (9th Cir. 1984), addresses the appealability of a case that was consolidated with another case for all purposes — not merely for multi-district proceedings or for trial. If petitioners believed that the enforcement and appeal of the 1995 Class Judgment soon after its entry was inconsistent with the Ninth Circuit's guidance in *Huene*, they should have raised that point below over a decade ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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Supreme Court of the United States

CELSA HILAO, DANILO DE LA FUENTE, RENATO PINEDA, ADORA DEVERA, RODOLFO BENOSA, JOSE DURAN, JOSEFINA FORCADILLA, ARTURA REVILLA AND CHRISTOPHER SORIA,

Petitioners,

v.

REVELSTOKE INVESTMENT CORPORATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The central question presented by the Petition is whether federal law, not state law, determines when a federal judgment on a federal cause of action accrues for sunsetting purposes. Thousands of federal judgments on federal causes of action are entered by federal courts each year. Because of the conflict among the circuits there is no certainty as to the length of time federal judgments may be enforced, and judgment creditors and debtors are left to guess. This Court should grant certiorari in this case to resolve the conflict.

ARGUMENT

I. Deferral of Decision on this Petition Is Appropriate Until the Hawai'i Supreme Court Decides the Certified Question

The Supreme Court of Hawai'i accepted the certified question for decision, Pet.App.31a, and the briefing in that Court is now complete. The Supreme Court of Hawai'i, well aware of the Ninth Circuit's opinion in this case, would not have accepted the question for decision had it believed that its decision in *International Savings & Loan Ass'n, Ltd. v. Wiig,* 921 P.2d 117 (Haw. 1996) – which the Ninth Circuit relied upon – answered the question. Revelstoke tries to exploit the reservation in that Court's order (that it has not yet conclusively decided whether to answer the certified question), but such a reservation is

common among state high courts adjudicating certified questions from federal courts.[1]

Since this Petition was filed, the Hawai'i Intermediate Court of Appeals issued a divided opinion interpreting Haw. Rev. Stat. § 657-5. *Estate of Roxas v. Marcos*, ___ P.3d ___, 2009 WL 352878 (Haw. Int. App. Feb. 12, 2009).[2] Although a two-judge majority held that the ten year period of Haw. Rev. Stat. § 657-5 accrued upon entry of a state court judgment, a vigorous dissent contended that this Court's decision in *Borer v. Chapman*, 119 U.S. 587 (1887) mandated the conclusion that the ten year period did not accrue until after all appeals were resolved. Neither the majority nor the dissent could cite any definitive decision of the Supreme Court of Hawai'i on the issue. Therefore, the decision of the Supreme Court of Hawai'i on the certified question will be the first authoritative interpretation of the meaning of Section 657-5.

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[1] At page 11 of its Brief in Opposition, Revelstoke omitted the first two words in the quote from the Supreme Court of Hawai'i's order which stated "**without conclusively** determining whether this court will answer the question . . . " (emphasis added). Pet.App.32a.

[2] The majority opinion casts doubt on the Ninth Circuit's interpretation of Hawai'i Supreme Court precedent. It stated that *International Savings & Loan Ass'n, Ltd. v. Wiig*, 921 F.3d 117 (Haw. 1996) – relied upon by the Ninth Circuit – was limited to the "narrow issue" of interpreting the first sentence of H.R.S. § 657-5, not the third sentence. 2009 WL 352878 at 4. The Ninth Circuit applied *Wiig* to the third sentence.

Revelstoke implies some impropriety on the part of the federal district court for certifying a question to the Supreme Court of Hawai'i. When the issue of interpretation of H.R.S. § 657-5 arose a second time in MDL 840, a consolidated proceeding, it was entirely appropriate for the district court to propose, *sua sponte,* certification of the issue to the state court. The certification was a proper exercise of federal/state comity to ask the state's highest court for an authoritative interpretation on an issue the federal court could only predict. Counsel for all parties were present or participated by telephone.[3] All counsel participated in drafting a proposed order and submitting it to the court for approval. No one appealed the order. Certainly Revelstoke was not disadvantaged. It intervened before the Supreme Court of Hawai'i and filed an extensive *amicus* brief in support of the Marcos Estate.

II. Petitioners Raised All of the Proposed Questions in the Courts Below

The question whether federal or state law controlled the sunsetting of the Class's judgment was the central issue in both the district court and court of appeals. The district court ruled that federal law

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[3] In 1991, certain class counsel were appointed by the court as lead and liaison counsel for all the consolidated cases in MDL 840, including the *Sison/Piopongco* cases. So the presence and participation of class counsel at the hearing was routine and proper.

applied to the expiration of a federal judgment on a federal cause of action, and that the judgment was not final until the court of appeals issued its mandate after affirming the judgment for the Class. Pet.App.23a. Before the Ninth Circuit, Petitioner specifically raised in its Opposition Brief, in the "Questions Presented On Appeal," the issue of when a federal judgment accrues for sunsetting purposes:

> In the alternative, whether the District Court ruled correctly that any statute of limitations applicable to Judgment of the Class of Human Rights Victims did not start until after this Honorable Court affirmed the lower court's rulings (on December 17, 1996) and returned the mandate to the District Court (on January 8, 1997)?

Appellees' Br. at 5 (Aug. 25, 2006). The court of appeals reversed the district court's application of federal law, concluded that state law determined when the time period of a sunsetting statute begins, and then predicted how the Hawai'i statute should be interpreted, even though no authoritative interpretation had been made by any state appellate court. Pet.App.1-21a.

The question of when a Rule 58 final judgment was entered was always before the courts below, because a time period and a start date are essential before enforcement of a judgment may be held to have expired. The district court did not originally determine when the Rule 58 judgment had been entered because it ruled that the operative date for

the beginning of the running of a sunsetting statute was when the mandate was returned by the court of appeals. Subsequently, the district court ruled that the Rule 58 final judgment was entered on December 6, 1995. Pet.App.29a. The court of appeals reversed but never addressed the date the final judgment was entered. As a result, the question was raised specifically in a petition for rehearing.

Certification of a question to the Supreme Court of Hawai'i was proposed by Petitioners in their rehearing petition in the Ninth Circuit. This Petition does not claim error on the part of the court of appeals for not certifying the question, but now that the issue has been certified and now that the Supreme Court of Hawai'i has accepted the issue for decision, it is appropriate for this Court to defer decision on this Petition until that Court rules.

Therefore, Petitioners raised in the courts below all the questions in this Petition. In the very case cited by Revelstoke, *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992), this Court stated:

> Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below (citations omitted)
>
> * * *
>
> A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame

the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.

III. The Ninth Circuit Decision Conflicts with *Borer*, *Jalapeno* and *Home Port Rentals*

The question of whether state law controls the accrual of a federal judgment was described by the Ninth Circuit as "novel," *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 536 F.3d 980, 982 (9th Cir. 2008), but Revelstoke nonetheless argues that the Ninth Circuit's conclusion is based on a "well-settled principle." Opp.Br. at 22. Tellingly, Revelstoke cannot cite any case to support this "well-settled principle" except for the Ninth Circuit's opinion below. Nor can the Ninth Circuit decision be reconciled with this Court's decision in *Borer* or the Fifth and Sixth Circuit's decisions in *Home Port Rentals* and *Jalapeno*.

In *Borer*, this Court stated the general common law principle that a state sunsetting statute does not begin to run on a federal judgment until all appeals are completed. The principle stated in *Borer* cannot be limited to the specific facts of that case as suggested by Revelstoke. "Principles formulated by federal judicial law have been thought by this Court to be necessary to protect uniquely federal interests." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964). *Borer* has been cited in later decisions of this Court and has never been limited or overruled. The adoption of Rule 69(a) did not, *sub silentio*,

undermine the *Borer* principle, and this Court has cited *Borer* after adoption of Rule 69(a). *See United States v. Wurts*, 303 U.S. 414 (1938). Furthermore, the federal registration statute, 28 U.S.C. § 1963, employs the principle embodied in *Borer* by providing that a judgment is not ripe for transfer from one district to another until "the judgment has become final by appeal or expiration of the time for appeal."

Revelstoke is incorrect in contending that *Home Port Rentals, Inc. v. International Yachting Group, Inc.*, 252 F.3d 399 (5th Cir. 2001) and *Jalapeno Prop. Mgmt., LLC v. Dukas*, 265 F.3d 506 (6th Cir. 2001) did not employ a federal accrual date for the running of the state sunsetting periods. In *Home Port Rentals*, the Fifth Circuit found that the ten-year prescriptive period under South Carolina law did not commence until after appeals were complete on the federal judgment even though the South Carolina statute would have commenced running upon entry of the trial court's judgment. 252 F.3d at 406. In doing so, it applied federal common law by looking to the standard set forth in Section 1963. Likewise in *Jalapeno*, the Sixth Circuit reversed the district court which, applying state law, had ruled that the ten-year prescription period commenced after the federal judgment was first entered. 265 F.3d at 510. The Sixth Circuit applied federal common law in concluding that "the ten-year [Tennessee] statute of limitations did not begin to run until after this court had issued its second mandate." *Id.* at 514.

Accordingly, the Ninth Circuit's decision is in direct conflict with *Borer*, *Home Port Rentals* and *Jalapeno*.

IV. The Ninth Circuit's Fundamental Error in Ignoring the Date the Rule 58 Judgment Was Entered Warrants Vacating and Remanding

The Petition conclusively demonstrates that, as later held by the district court, Pet.App.29a, a Rule 58 judgment was not entered until December 6, 1995, less than 10 years before the judgment was transferred to Texas. The Ninth Circuit simply ignored this and assumed that the February 1995 order was the Rule 58 judgment. But docket entries do not lie. The arguments raised by Revelstoke exalt form over substance. It contends that the title on a court order or the clerk's stamp at the top of a court order renders it a Rule 58 judgment. Opp.Br. at 26. This cannot be or else all orders having the word "judgment" in their title would automatically become Rule 58 judgments. That outcome would render superfluous Rule 54(b) and this Court's opinion in *United States v. Indrelunas*, 411 U.S. 216 (1973), where this Court interpreted Rule 58 to require that "every judgment shall be set forth on a separate document" signed and entered on the docket by the clerk. *Id.* at 222. Revelstoke offers no explanation as to what purpose or meaning the December 6, 1995 entry serves if not as a Rule 58 final judgment. Rather, it simply wishes this Court to ignore the docket entries and the single

judgment entry of December 6, 1995 signed by the clerk which constitutes the final Rule 58 judgment in the consolidated litigation.

Revelstoke also argues that in the months between February and December 1995 Petitioners took action based on the February 1995 "judgment" order and that the Marcos Estate filed an appeal from the February 1995 order. Parties do not determine what is a Rule 58 final judgment, docket entries do. What Revelstoke fails to mention is that the Estate, like other appellants, filed successive appeals as posttrial motions were resolved to ensure that its appellate rights would be protected. The Ninth Circuit only had appellate jurisdiction from a final judgment, which was the December 6, 1995 judgment. Whatever confusion existed in the period leading up to December 1995 as to the finality of judgment orders under Rules 54(b) and 58(b) entered in the consolidated cases, the entry of the Rule 58(b) order by the clerk on December 6, 1995 resolved the issue.

Because it is incontrovertible on this record that a Rule 58 final judgment was entered less than 10 years before the judgment was transferred to Texas, the judgment registered in Texas was valid, enforceable and began a new enforcement period under Texas law. The Texas judgment, not the Hawai'i judgment, was the only one which affected Revelstoke. For that reason, Revelstoke had no Rule 24 property interest whatsoever in the Hawai'i judgment and its intervention was improper. Accordingly, the Ninth Circuit's opinion in this matter should be

vacated and the matter remanded to the Ninth Circuit with instructions to affirm the district court's decision.

CONCLUSION

For all the foregoing reasons Petitioners respectfully urge this Court (1) to defer consideration of this Petition until the Hawai'i Supreme Court has ruled on the certified question of state law central to this appeal, and (2) then grant certiorari to review the issues presented. In the alternative, this Court should vacate the Ninth Circuit's opinion and remand the case with instructions to affirm the decision of the district court.

Respectfully submitted,

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